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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT W. BOUTZ,
Petitioner,

VERSUS

FEDERAL AVIATION ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Whether the termination of Petitioner, ROBERT W. BOUTZ, from his position as a GS-855-12 Electronic Engineer was effected in a lawful manner as a result of his declination to accept a proposed reassignment; the reassignment having been proposed as part of a "standard" (or mandatory) employee rotation program to which he did not agree when he was hired under a written "Employment Agreement."

2. Whether the Employment Agreement entered into between Petitioner Boutz and the Federal Aviation Administration was a contract, with fixed terms and conditions, or whether it was some other type arrangement to which the FAA was not bound, and which permitted the FAA to unilaterally change the obligations of the employee by merely revising the Agency Order which was made a part of the Employment Agreement and incorporated therein.

3. Whether a dispute over an employment contract between an employee and a government agency is entitled only to the narrow scope of review which is accorded to administrative decisions arising from an agency's application of purely regulatory orders; or, whether such disputes are to be treated as a matter of contract litigation with the contentions of both parties to it standing in *pari materia,* and with the interpretation of neither party being accorded any greater weight than that of the other.

4. Whether an Agency can lawfully contract with its own employee to extend or limit the administrative and regulatory authority granted to the Agency by law or executive order?

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OPINIONS BELOW

This Petition for Writ of Certiorari is taken to the Judgment of the United States Court of Appeals for the District of Columbia Circuit, dated and entered on January 23, 1981, in consolidated cases Nos. 79-1178 and 79-1179, both styled, ROBERT W. BOUTZ, Appellant vs. FEDERAL AVIATION ADMINISTRATOR, Appellee. The Judgment of the Court of Appeals was without opinion and is unpublished. No Petition for Rehearing was filed.

The appeals to the Court of Appeals were taken to the decisions of the United States District Court for the District of Columbia in Civil Actions Nos. 77-1287 and 78-1108. There are no opinions by the trial court.

JURISDICTION

The Supreme Court's jurisdiction to entertain this Petition for Writ of Certiorari is conferred by 28 U.S.C. 1254(1).

STATEMENT OF CASE

The Petitioner was employed as a GS-855-12, Electronic Engineer at the FAA Aeronautical Center at Oklahoma City, Oklahoma on April 6, 1969, having previously been employed at Tinker Air Force Base, Oklahoma, by the Department of the Air Force.

As a now alleged condition of Petitioner's employment he was required to sign a "3R agreement" subject to the terms of FAA Handbook 3330.6 entitled, Reemployment, Restoration, and Return Rights (See Appendix, Exhibit 1). At the time of the Petitioner's employment the FAA Aeronautical Center obtained from the Southwest Region of the FAA an agreement that the Petitioner would have return rights to the Southwest Region in accordance with the provisions of Handbook 3330.6. This contract granted Return Rights for an initial period of two (2) years and was renewed, according to the terms of the Handbook, at the end of that initial two (2) year period for an additional two (2) years (See Appendix, Exhibit 2). Both the original agreement and the two (2) year extension agreements specifically incorporated Handbook 3330.6 into the agreement between the Petitioner and the Agency as the instrument which governed the relationship between the parties. The extension agreement further incorporates itself into and is made a part of the original agreement.

On July 27, 1971, which was more than three (3) months after Petitioner's two (2) year extension of the agreement, the FAA cancelled Handbook 3330.6 and adopted a revised and modified version of the Handbook and thereafter designated it as FAA Handbook 3330.6A. This revised Handbook contained the following added provision:

> "Paragraph 31.b(1) When an employee has served two consecutive tours of duty, he may at the option of the Aeronautical Center be returned to his parent organization. This option may be exercised on an individual case-by-case basis or by a standard rotation policy."

The revised edition also deleted the following provisions of Chapter 3:

> "41c. An employee who is eligible for reemployment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty. Otherwise, his reemployment rights expire. (FAA Form 3330-51)
>
> "42c. When an employee has served threee tours of duty he may be returned to his parent organization, or he may forfeit his reemployment rights and remain at the Academy."

At the time of implementation of the revised Handbook 3330.6A, approximately one-half of the instructors at the FAA Academy had forfeited their return rights under this latter, deleted provision of the original Handbook 3330.6.

At all times from the inception of the Reemployment, Restoration and Return Rights Program (3-R Program) in the year 1962, until the promulgation of the revised Hand-

book 3330.6A in 1971, there was no attempt by the Academy Superintendent to force the rotation of any instructor (i.e., a forced reassignment) to one of the FAA Regional Offices. The FAA promoted and administered the program as an employee right to be exercised at the option of the employee.[1] Immediately after the promulgation of the revised Handbook however, it suddenly became the practice of the Academy Superintendent to force the rotation of all instructors after four (4) years. It is notable that at that time, any instructor who still had an active 3R agreement had been employed at a time when the agreement was made under the terms of the original Handbook which did not contain the provision for forced rotation or return of instructors after four (4) years.

In January, 1973, near the end of his fourth year, the Petitioner was requested to complete and sign a form electing to either exercise his reemployment rights or to extend them an additional two (2) years. The Petitioner did neither, but instead wrote across said form that he "elected to allow his return rights to expire" in accordance with paragraph 41(c) of 3330.6. This was an expiration of reemployment rights which would have been recognized by the Academy prior to conversion of the 3R Program from an employee right to a rotation program.

On February 7, 1973, the Academy Superintendent issued a letter to the Petitioner stating that 3330.6A was

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[1] Appellant's second level supervisor (Mr. Robert Brown) stated to the Grievance Examiner that in the opinion of the instructors, the program as administered under the original Handbook, was an Instructor's avenue back to the field (position), was a recruitment aid and a right and benefit of the Instructor, and not an avenue to remove Academy Instructors from their position. (Appendix, Exhibit 3)

now controlling, that all instructors were required to rotate, that the Manpower Division was being asked to proceed to obtain a position for the Petitioner in his parent organization (Southwest Region), and that he could not accept the Petitioner's forfeiture of reemployment rights. (Appendix, Exhibit 3(a)).

In a meeting on February 14, 1973, the Petitioner was informed personally by the Academy Superintendent that he could not forfeit his reemployment rights, and that if a contractual obligation of the Petitioner to rotate to the Southwest Region did not exist, that he could still be transferred to the Southwest Region by authority of PTP 3330.9 which provides for "administrative reassignment and relocation" when such action is "considered to be in the best interest of the agency or civil aviation in general." (Petitioner and the Superintendent both included memorandums of this conversation in the Administrative Record, and they are located at Appendix, Exhibit 5.)

Petitioner thereafter filed an agency grievance. The Aeronautical Center Director denied relief to the Petitioner and concurred in the findings of the grievance examiner. The grievance examiner found that Handbook 3330.6A was the basis of the 3-R Program policy and that Handbook 3330.6 had been cancelled on July 27, 1971, with the issuance of Order 3330.6A; and that this was procedurally correct.[2]

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[2] The Grievance Examiner stated as follows:

> "The principal Order and essentially the basis of Academy policy is Order 3330.6A, dated 27 July 1971, and titled Reemployment, Restoration and Return Rights. This Order cancels Handbook 3330.6, dated 3 November 1967." (Also see Appendix, Exhibit 18)

The Petitioner's Grievance was accepted for processing on March 2, 1973. It was also on March 2, 1973, that the Superintendent issued a policy letter to all instructors stating that ". . . there will be no changes in the current policy being followed on rotation and expressed in Orders 3330.6A and AC-3330.8B." On March 5, 1973, Petitioner's Branch Chief issued a policy letter stating, "Handbook 3330.6A and Order AC-3330.8B . . . provide the objectives and policies which will be followed in all decisions and actions relating to the 3-R Program." (See Appendix, Exhibits 6 and 7). NEITHER OF THESE POLICY LETTERS MADE ANY REFERENCE TO HANDBOOK 3330.6.

On March 16, 1973, the Southwest Region's office of the FAA in Fort Worth, Texas, in response to a request of the Academy Superintendent, offered a GS-855-12 (Engineering Technicians job) to Petitioner. By contrast to his encumbant professional position of GS-855-12, Electronic Engineer, requiring a high level of technical competence and responsibility, the offered position was a non-professional technicians position which primarily consisted of the manual installation of electronic equipment throughout the Southwest Region and required ninety percent (90%) travel. The Petitioner objected to this job offer by a letter of April 9, 1973, to the Academy Superintendent, but the letter was ignored and never answered. (Appendix, Exhibit 8).

By letter to the Academy Superintendent, dated April 16, 1973, the Petitioner declined the job offer from the Southwest Region in accordance with, and as authorized by paragraph 42(c) of Handbook 3330.6. (Appendix, Exhibit 5).

On May 4, 1973, the Academy Superintendent replied by letter as follows:

> "Therefore, while I sincerely regret that an adjustment suitable to you cannot be made, the only present recourse for you in order to retain your employment with the FAA is for you to fill the Southwest Region's job position. Your repeated declination of this job offer leaves me no recourse but to hereby direct your reassignment to the Southwest Region. If you refuse to comply with this relocation directive, you may be separated from the FAA.
>
> "So that we will know your positive intentions, please advise me in writing by May 21, 1973, your decision to comply with or refuse this assignment to the Southwest Region."

The Petitioner, at this time being uncertain of what his employee rights and status were, on May 18, 1973, requested the Academy Superintendent to furnish to him answers to the following questions:

> "As a result of your directing my reassignment to a GS-802-12 in the Southwest Region, and your proposed termination if I refuse the reassignment, I request clarification of the following points. Please give a specific answer to each question.
>
> 1. Does the FAA Academy consider the Employment Agreement and the subsequent extension to be a contract, which is binding upon me?
>
> 2. At this time do the terms of 3330.6 apply to me?
>
> 3. At this time do the terms of 3330.6A apply to me?

* * *

13. Under exactly what regulation, statute, executive order, or other authority has my reassignment been directed and how many Academy instructors have been reassigned under this authority in the past twelve months?

14. Under exactly what regulations, statute, executive order or other authority will I be terminated if I refuse the reassignment, and how many Academy instructors have been terminated under this authority in the past twelve months?" (See Appendix, Exhibit 10 for full text.)

In a May 21, 1973 conversation, the Superintendent demanded that the Petitioner give an immediate reply to his directed reassignment. The Petitioner and his attorney pointed out that the questions of May 18, 1973, had not been answered and that the Petitioner could not make an informed decision. Over the denials of the Petitioner and his counsel the Superintendent repeatedly stated that his official position was that the Petitioner's questions of May 18, had been "considered" in his recent grievance. A record of the conference was later supplied to the Petitioner and appears in the Appendix as Exhibit 11.

In a May 21, 1973 letter the Petitioner informed the Superintendent that under the circumstances he would remain passive with regard to the reassignment until, at least, his questions of May 18, 1973 were answered. (Appendix, Exhibit 12)

At no time did the Petitioner state that he would not relocate.

On May 25, 1973, the Petitioner signed for a hand delivered letter proposing his termination for ". . . your re-

fusal to accept a position change within the FAA which would carry out the terms of the established administrative Return Rights Policy for Academy Instructors." (Appendix, Exhibit 13). The letter referenced both Handbooks 3330.6 and 3330.6A. After the Petitioner signed for the letter of proposed termination he was then given a letter also dated May 25, 1973, which purported to be answers to his questions of May 18, 1973. (Appendix, Exhibit 14). The answers said that both Orders 3330.6 and 3330.6A applied to the Petitioner.[3]

The Petitioner responded by letter of 9 June 1973, in which he pointed out numerous errors and stated: "I have neither requested nor refused a reassignment." (Appendix, Exhibit 15)

A June 28, 1973 letter of decision removed the Petitioner from the FAA effective July 6, 1973, and referred only to Handbook 3330.6. (Appendix, Exhibit 16). On July 9, 1973, a Form 50 was issued to that effect. (Appendix, Exhibit 17)

At the Civil Service Evidentiary Hearing thereafter held, the Academy Superintendent testified:

"Q. Mr. Daugherty, during — at the time that Mr. Boutz was appealing to you and negotiationg with you for an alternate reassignment, or to remain

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[3] The Academy Superintendent also answered as follows:

"13. Your assignment to the Southwest Region has been directed under authority of the 3-R Program. Program features were contained in 3330.6 and are now set forth in 3330.6A. There have been many instructors relocated under this authority." (See Appendix, Exhibit 14)

at the Academy as the case might have been, were you guided in your thinking and in the actions that you took by Handbook 3330.6, or 3330.6-A?

A. In Mr. Boutz's case, 3330.6, although we used 3330.6-A as a reference, because there was no change."

The Petitioner having exhausted his administrative remedies, thereafter filed suit in the United States District Court for the District of Columbia in Civil Action Number 77-1287. Also, on July 30, 1975, the Petitioner filed suit in the United States District Court for the Western District of Oklahoma, in Civil Action Number 75-0636-E to recover severance pay under Title 5 U.S.C. Section 5595 for his involuntary separation from service. Petitioner's request for relief in the Western District of Oklahoma was denied by Summary Judgment and he appealed this case to the United States Court of Appeals for the Tenth Circuit which reversed the District Judge and remanded the case for new trial. Thereafter the Government Agency filed a motion to transfer the Oklahoma case to the District of Columbia and that motion was granted and the case was transferred to the United States District Court for the District of Columbia as Civil Action Number 78-1108.

Both cases were assigned to the Honorable Gerhard Gesell, United States District Judge for the District of Columbia. On behalf of the Federal Aviation Administration, Government counsel filed a Motion for Summary Judgment in the reinstatement case (Civil Action No. 77-1287) and filed a Motion to Dismiss or in the alternative, for Summary Judgment in the severance pay case (Civil Action No. 78-1108).

On November 3, 1978, the Trial Judge below, without hearing, entered a final Order in each case, with each of these Orders stating that they were made upon a consideration of the entire record. The record in these cases includes over 900 pages of administrative record.

The orders entered by the Trial Judge on November 3, 1978, sustained the Government's Motion for Summary Judgment in Civil Action No. 77-1287 (reinstatement case), and dismissed the Petitioner's complaint in Civil Action No. 78-1108 (severance pay case).

Appeal was thereafter taken to the United States Court of Appeals for the District of Columbia Circuit, which, on January 23, 1981, entered a Judgment without opinion which affirmed the judgments appealed from. (Appendix, Exhibit 18)

REASONS FOR GRANTING THE WRIT

The center of this case is a controversy concerning the rights and obligations of the Petitioner under a document with the dual status of being both a regulation and part of a contract. This document is designated as FAA Handbook 3330.6 and was incorporated by reference into an employment agreement between Petitioner and the Federal Aviation Administration (FAA).

Subsequent to the Petitioner agreeing to a second tour the FAA issued a revised document designated as FAA Handbook 3330.6A which purported to cancel the prior Handbook, and which further authorized and created an employee rotation program which was not included in the original Handbook 3330.6. The FAA Academy Superinten-

dent then informed all employees who had agreed to the terms of the original Handbook that they were under the exclusive control of the revised Handbook (3330.6A) and would be rotated. When the Petitioner was informed that he would have to rotate to a different geographic area under the authority of the revised Handbook (3330.6A), he objected and declined to accept a reassignment by stating that he was a passive element. The Agency then proposed, and eventually carried out his termination for refusing to accept a reassignment that would have carried out the terms of an "established policy". The letter of proposed termination (Appendix, Exhibit 13) referenced both Handbooks in support of the authority for the reassignment, while the letters of decision to terminate (Appendix, Exhibit 16) referenced only the original Handbook (3330.6). At the Civil Service Commission Hearing regarding the Petitioner's termination, the FAA Academy Superintendent stated that the reassignment was made pursuant to the original Handbook (3330.6). The record contains numerous documents dated up to and including the date of the Petitioner's termination proposal which state that the revised Handbook (3330.6A) was the basis for the reassignment. But the Record does not contain any documents dated prior to the Petitioner's termination proposal declaring Handbook 3330.6 to be the basis.

ARGUMENT

I. THE FAA'S ATTEMPT TO CHARACTERIZE THE APPLICATION OF HANDBOOK 3330.6A TO THE PETITIONER AS A "TECHNICALITY" IS AN INSULT TO THE RECORD.

The Petitioner contends that the application of Handbook 3330.6A to him was not an accidental, transitory, minor or a "technical" oversight by the FAA Academy, as declared by the Respondent[4] but was rather an on-going, concerted and pervasive effort of nearly two years duration, to deprive all persons who had agreed to the 3R program under Handbook 3330.6 of the rights, benefits and past practices of that document; and, to substitute in its place the obligations and demands of mandatory rotation under Handbook 3330.6A. Employees who objected to this effort were constantly informed that their only alternative to rotation was termination. Administration of the 3R program continued under the control of the revised Handbook 3330.6A even after the proposal to remove the Petitioner for allegedly violating Handbook 3330.6, and until at least 6 July 1973, when the Petitioner was terminated.

Disclosure of the complete Administrative practices related to the 3R program would expose the reason given for

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[4] The Respondent's Appeal Brief stated:

> "Though we concede that his contention that Handbook 3330.6A was inapplicable is technically correct, it does not affect the outcome, for the procedures employed to remove him for improperly refusing reassignment did not infringe appellant's procedural rights, even if both Handbooks were applied, since neither contained language which modified or was inconsistent with his contractual obligations or rights."

the Petitioner's termination for what it was: a deliberate creation of a fictitious 3R policy of rotation under the control of Handbook 3330.6, which in fact did not exist at the time of Petitioner's employment or at any time in the past. Furthermore, that this "creation" was an attempt to fabricate a justifiable reason for the termination of Mr. Boutz as "punishment" for refusing to accept the actual policy of rotation under Handbook 3330.6A which was being applied to all other persons included in the 3R program without exception. The other persons had also entered into the employment agreement which incorporated Handbook 3330.6 into its terms and conditions.

The publication of Handbook 3330.6A altered the 3R program from a voluntary Return Rights Policy to a mandatory rotation policy which excluded Handbook 3330.6 and which was controlled exclusively by Handbook 3330.6A. This policy was applied to *all* instructors including the Petitioner. This fact can be confirmed by reading four references: (1) Feb. '73, letter from the Superintendent of the Academy to Petitioner (See Appendix, Exhibit 4); (2) 2 March '73 letter from the Superintendent of the FAA Academy to all Supervisors and instructors (See Appendix, Exhibit 6); (3) 5 Mar. '73, letter from the Petitioner's Branch Chief, W. M. Quitter, to all personnel (See Appendix, Exhibit 7); and (4) Findings of the Grievance Examiner (See Appendix, Exhibit 18 and preceeding footnote 2).

Faced with the application of a rotation policy which was authorized by Handbook 3330.6A, but which was not a part of the contract to which the Petitioner had agreed, he insisted on clarification of his individual status. When the clarification was deliberately withheld, the Petitioner

assumed a position of passivity with regard to the 4 May 1973 reassignment which was made pursuant to the 3R program. During early 1973 the Petitioner was only one of scores of instructors, none of whom were allowed to testify at the CSC Hearing,[5] who were objecting to having the terms of their contract unilaterally altered by the Sup-

[5] At the Civil Service Commission Evidentiary Hearing, the Hearing Examiner ruled as follows:

"HEARING EXAMINER: Thank you very much.

At this point I would like to give my decision on your request for these other witnesses.

MR. BROCK: All right.

HEARING EXAMINER: I believe I earlier read the names of these people into the record. And my understanding is that you would expect these people to testify concerning the return rights program and their experiences in connection with it, as compared to the experience of Mr. Boutz.

Is that generally correct?

MR. BROCK: And beyond that, to the overall administration of the 3R program. In other words, their testimony would bear relevance not really to their individual unique circumstances, but as to the employment, or administrative practices and policies which the Aeronautical Center Administration followed with respect to the total 3R program as it applied to everyone, which would include Mr. Boutz.

Now, possibly Mr. Carter is willing to make some stipulation in regard to that.

MR. CARTER: No.

HEARING EXAMINER: Let me say this. That based upon my reading of the record, as far as the contentions are concerned, the material that's already in the file concerning the program, it would be my decision that the testimony of these people would not be relevant and material to the case of Mr. Boutz. And on that basis I would decline to approve their attendance as witnesses."

erintendent's policy of substituting Handbook 3330.6A for the original terms to which they had agreed. In order to insure that the Superintendent's policy would remain the "established policy", the Superintendent ignored the Petitioner's statements of passivity, declared that the Petitioner's 16 April '73 declination of a job offer to be a refusal of a 3R reassignment that did not take place until the later date of 4 May '73, a chronologically impossible sequence (See Appendix, Exhibit 16, Letter of Decision), and fired him. In the Superintendent's letters which proposed and accomplished the Petitioner's termination, and in the testimony given at the CSC Hearing, the Superintendent claimed that the "policy" was such that Handbook 3330.6 was applied to the Petitioner with respect to the 3R program,[6] during the Spring of 1973. However, this conflicts directly and totally with the policy for this same period of time as contained in the record and stated by the Superintendent in letters (1) and (2) and confirmed by letter (3) cited in the preceeding paragraph and by the Grievance Examiner's Report (See Appendix, Exhibit 18 and footnote 2). The Petitioner alleges that had the CSC Hearing Examiner allowed the other requested witnesses to testify, that they would have confirmed that in the Spring of 1973 the 3R policy in effect denied *all* instructors, including third tour employees who had signed contracts under 3330.6, the use of 3330.6, and required rotation under 3330.6A. *The unstated reason the Petitioner was fired was to demonstrate to the FAA Academy personnel the wisdom*

[6] See quoted statement of Superintendent Daugherty contained in Statement of Facts, *supra.*

of quietly accepting the Superintendent's policy of rotation by substituting 3330.6A for the terms of the contract to which they had agreed. A reflection of this reason may be seen clearly in the FAA's statement that other instructors could not be expected to meet their obligations under the 3R program, unless the Petitioner was "punished" for refusing to meet his obligations.[7]

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[7] At the Civil Service Commission Hearing the FAA presented the following persuasian to the Hearing Examiner:

"Also, if one instructor can refuse relocation under the provision of the 3-R Program without penalty, so could all the other approximately 250 or more instructors who are subject to the program. The net effect would be to negate the 3-R Program."

• • • •

"The removal action which was taken was management's only recourse if it expected to maintain a viable and continuing rotation program. If one instructor could refuse relocation, so could all the other approximately 375 instructors who are not subject to relocation. Should a ruling emerge which reinstates the Appellant, such ruling in effect washes out the FAA Administrator's rotational program.

"For these reasons, we urge that the Commission sustain the Deciding Official."

II. HANDBOOK 3330.6 BECAME THE TERMS OF A CONTRACT AND AS SUCH DO NOT HAVE THE LIMITED PROCEDURAL REVIEW RESERVED FOR AGENCY REGULATIONS.

The Respondent successfully argued in prior proceedings that "Courts traditionally defer to an Agency's interpretation of its own regulations." It is the contention of the Petitioner that in this case such action by the court would deny Petitioner the equal protection of the law to which he is entitled. The Return Rights Agreement is much more than an Agency regulation. It is also a contract. The Petitioner has a right to allege that the Agency violated the contract and to receive a full judicial review of the merits of his complaint. This fundamental right should not be denied the Petitioner simply because certain terms and conditions of the contract were taken from Regulatory Handbooks or Orders.

Should the persuasiveness of the FAA's interpretation of the 3R program prevail, the Agency would become both the judge of the merits of alleged contract violations as well as the authority that sets the punishment for such acts, and the Agency's interpretation of it would be given unjustifiable persuasiveness. Confusion over the distinction between a regulation and a contract has precipitated errors by the FAA, the Civil Service Commission and the courts in rendering decisions in this case. The Petitioner is not challenging the Agency's broad authority to promulgate internal personnel instructions, directives and regulations, but rather the FAA's interpretation, administration and enforcement of a contract. The Petitioner contends that if the rights of any party are diminished by incorporating the terms of a contract into an agency regulation, then the act of incorporation itself becomes arbitrary and capricious.

III. THE PETITIONER'S BASIC CONTRACTUAL RIGHTS HAVE BEEN IGNORED IN ORDER TO IMPLEMENT ADMINISTRATIVE AND REGULATORY AUTHORITY AND PREROGATIVES.

A basic rule of contracts is that "A contract should be construed as a whole or if reasonably possible, all parts of the agreement should be given effect." *Barnes* v. *Townley*, 448 P.2d 468, 471 (Okla. 1969); *National Aviation Underwriters, Inc.* v. *Altus Flying Service*, 555 P.2d 782 (10th Cir. 1977). If the interpretation of FAA is accepted, Handbook 3330.6, Chapter 3, Para. 41(c) and 42(c)(1) become useless nulities, totally at odds with the Agency's claim that the 3R program was an established rotation policy. Paragraph 41(c) states: "An employee who is eligible for employment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty, otherwise, his reemployment rights expire." This term is consistent with the Petitioner's contention that the program had been intended and administered as a voluntary program and utilized as a recruitment aid. It is not the fault of the employee that the term seems to be inconsistent with other terms of the Handbook, and with the Agency's claim that the program was an established rotation policy. The Agency prepared the document and its instrinsic ambiguity that developed with the change of the policy in 1971 from a right of the employee to a rotation plan, should be held against the Agency and not the employee. Handbook 3330.6, Para. 42(c)(1) gives third tour employees the unilateral right to forfeit their return rights and remain at the Academy. This term clearly shows that the Agency did not intend for the contract under Handbook 3330.6 to be a mandatory rotation policy after two tours. The rotation plan that came about was not a part of the

Petitioner's contract, which does not even contain the word "rotation". Furthermore, the Petitioner alleges that had the testimony of the requested witnesses been allowed, it would have established the use and intent of Handbook 3330.6 at the time the parties entered into the contract and would have shown that a standard or mandatory, rotation program was not intended to be a purpose.

Title 15, Oklahoma Statutes, Section 15, provides: "A contract must be so interpreted as to give effect to the mutual intentions of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful" and "where the contract was an ambiguous one and the meaning of the contract was in dispute, evidence of intrinsic facts and circumstances throwing light on the intentions of contracting parties is admissible." *Harjo* v. *Harjo*, 247 P.2d 522. The terms of Handbook 3330.6, Chapt. 3, are ambiguous and the meaning of the contract is in dispute. The testimony of witnesses who could have testified about past practices, which are circumstances that would have thrown light on the intentions of the parties, was denied. It is therefore clear that the refusal by the Hearing Examiner to allow the witnesses requested to testify was a procedural error which prevented the Petitioner from presenting admissible evidence. In like manner, it was a procedural error for the Hearing Examiner to prohibit the testimony of the Superintendent concerning the 225 instructors who were not in the 3R program.

When viewed from a contractual perspective the Agency's past practice is an unresolved and incomplete issue of material fact which is in dispute, and since the Petitioner

was denied an opportunity to present admissible evidence on this issue, the trial court's Dismissal/Summary Judgment was inappropriate.

The Petitioner is due the equal protection of the law. The fact that the Agency has the authority to reassign the Petitioner for the best interests of the Agency should not automatically mean that any reassignment in the best interests of the Agency could not breach the contract. When the Petitioner's contractual rights are isolated from Agency Administrative and Regulatory authority, the breach of contract by the Agency is crystal clear, while it is equally obvious that the Petitioner faithfully upheld his obligations.

The Agency has readily accepted the advantages of the contract, but it has placed limitations on its administrative and regulatory authority. The Civil Service Commission and the trial courts have failed to provide the Petitioner with due protection.

If the contracting of limitations on Administrative and Regulatory authority, which represent the intent of the Executive and Legislative branches of the Government, are in fact illegal, then the contract should be declared null and void and the Petitioner granted the relief he is seeking.

IV. THE FAA HAS NOT ADDRESSED THE FACT THAT PRIOR TO THE TERMINATION PROPOSAL THE PETITIONER WAS NEVER INFORMED THAT HANDBOOK 3330.6 APPLIED TO HIM, BUT WAS REPEATEDLY INFORMED THAT HANDBOOK 3330.6A WAS THE ONLY HANDBOOK THAT APPLIED.

The following facts are irrefutable:

(1) On 7 Feb. '73, the Superintendent informed the Petitioner that Handbook 3330.6A is now controlling. (Appendix, Exhibit 4)

(2) On 2 Mar. '73 the Superintendent listed Handbook 3330.6A as the only Handbook applicable to the 3R program. (Appendix, Exhibit 6)

(3) On 5 Mar. '73 the Petitioner's Branch Chief stated that Handbook 3330.6A would be used in making all decisions on the 3R program. (Appendix, Exhibit 7)

(4) On 18 May '73 the Petitioner specifically asked the Superintendent, "At this time do the terms of 3330.6 apply to me?" (Appendix, Exhibit 10)

(5) In a May 21, 1973 meeting with the Petitioner and his representatives, the Superintendent repeatedly and deliberately refused to answer the questions posed by the Petitioner on 18 May 1973. (Appendix, Exhibit 11)

(6) On 25 May '73 the Petitioner received a termination proposal inferring that both Handbook 3330.6 and 3330.6A applied to him and that the reassignment was made under authority of the 3-R program which was controlled by Handbook 3330.6A. (Appendix, Exhibit 13)

(7) On 28 June '73 a letter of decision terminated the Petitioner for refusing to accept a position pursuant to the 3R program. Handbook 3330.6 was the only Handbook referenced. (Appendix, Exhibit 16)

In its Answer Brief on appeal the Agency made a point of "how squarely" the Superintendent informed the Petitioner that Handbook 3330.6 applied, while ignoring the fact that this "square" answer was not given until 25 May 1973, the very same day that the Superintendent proposed to terminate the Petitioner.

Prior to and even on the same day of his termination proposal, the Petitioner was repeatedly informed that Handbook 3330.6A was the only Handbook that controlled the 3R program, and the Superintendent steadfastly refused to answer the Petitioner's question: "At this time do the terms of Handbook 3330.6 apply to me?" The record could not be more clear. The response for which the Petitioner was fired was evoked by the repeated and consistent application of Handbook 3330.6A to him and the Superintendent's refusal to confirm that Handbook 3330.6 governed the Petitioner's rights. Under the record, no other conclusion is possible unless the Agency would like to argue that the Superintendent of the FAA Academy could only be believed after 25 May 1973 and that it was encumbant upon the Petitioner to know this.

The thrust of the Agency's argument is that in the Spring of 1973 the established 3R policy was such that FAA Academy personnel who had agreed to the 3R program under Handbook 3330.6 had been and were being rotated by that document and not Handbook 3330.6A. The record conflicts with that contention and raises a genuine issue of material fact.

V. THE EXISTENCE OF AUTHORITY THAT MIGHT HAVE BEEN APPLIED TO THE PETITIONER IS NOT SUFFICIENT GROUNDS FOR THE FAA TO PREVAIL.

The brief of the Agency submitted on Appeal stated: "Though we concede that his contentions that Handbook 3330.6A was inapplicable is technically correct, it does not affect the outcome . . ." The Agency would have to be a prophet to know what the outcome would have been. The Petitioner's response to a reassignment might have been quite different had the reassignment not been made by applying an inapplicable handbook and a rotation plan authorized exclusively by that handbook to him. The issue is the propriety of the Petitioner's response to the application of Handbook 3330.6A to him, and not the Agency's prophecy or the existence of authority that might have been applied. The assumption of "identical outcome" is representative of the basis for every decision rendered in this case to date, and it is mortally flawed. The "identical outcome" thesis is equivalent to saying "the record shows that the FAA had available to it appropriate authority to take the action that it took and that is sufficient to determine that the Petitioner should not prevail, and we need not consult the record further." The Petitioner argues that "appropriate authority available" is not sufficient but irrelevant where that authority was not applied. The authority applied to the Petitioner was Handbook 3330.6A and it was not applicable to him. The position to which the Petitioner had been reassigned was beyond the organizational control of the FAA Academy, and available to the Academy by, and only by, exercising the contract. Therefore, the reassign-

ment that came about was not possible without the contract, and "rotation" was not authorized without Handbook 3330.6A. The trap that the FAA Academy set for itself cannot be overcome unless the Petitioner's contractual rights are declared to be subservient to the FAA's need and authority to establish a rotation plan.

The Petitioner further contends that the decision to remove him for his response to the Agency's application of Handbook 3330.6A to him was grossly erroneous, and that the election to terminate him by claiming that this same response was a violation of the terms of 3330.6 was arbitrary and capricious. Therefore, this case should have been litigated as a contract action on its full merits and not as a limited review of administrative proceedings.

CONCLUSION

For the reasons set forth above, the Petitioner believes that this Court should grant and issue its Writ of Certiorari.

Respectfully submitted,

RILEY BROCK
3801 Classen Boulevard
Suite 200
Oklahoma City, Oklahoma 73118
Phone: (405) 528-3132

Counsel of Record for Petitioner

April, 1981

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 1981, that three (3) copies of the foregoing Petition for Writ of Certiorari with its accompaning Appendix, were mailed to the following named parties, by placing same in the U. S. Mail, postage fully prepaid:

Wade Hampton McCree, Jr.
Solicitor General
Department of Justice
Tenth & Constitution Avenue
Washington, D.C. 20530

Mr. John Terry
Chief of Appellate Division
United States Courthouse
Washington, D.C. 20001

R. Bruce Carter
FAA Aeronautical Center
P. O. Box 25082
Oklahoma City, Oklahoma 73125

All parties required to be served have been served.

RILEY BROCK

Office-Supreme Court, U.S.
FILED
APR 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2058

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT W. BOUTZ,
Petitioner,

VERSUS

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

APPENDIX

RILEY BROCK
3801 Classen Boulevard
Suite 200
Oklahoma City, Oklahoma 73118
Phone: (405) 528-3132

Counsel of Record for Petitioner

April, 1981

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EXHIBIT NO. 1

FAA Form 3330-5

EMPLOYMENT AGREEMENT FOR
ACADEMY INSTRUCTORS

Between the Federal Aviation Administration and
Employees Recruited for Assignment

(Name of FAA Representative)

E. E. CARPENTER
REEMPLOYMENT RIGHTS COORDINATOR

(Name of Employee)

BOUTZ, ROBERT W.

The employee named above and the Federal Aviation Administration agree as follows:

1. The employee's reemployment rights with the FAA shall be governed by the Administration Handbook 3330.6, Reemployment, Restoration, and Return Rights (hereinafter referred to as the Reemployment Handbook), which is hereby incorporated and made a part of the agreement, and the employee's reemployment rights under the provisions of the Reemployment Handbook shall be granted by *SOUTHWEST REGION* (Employee's Parent Organization).

2. The parties shall abide by and complete all employment agreements between them.

3. The employee agrees to remain in an instructor's assignment at the Academy for at least one tour of duty of 24 months. *1st tour expires April 1971*

4. If the employee remains at the Academy for less than the tour of duty specified herein, he is not entitled to reemployment rights.

5. If the employee completes the tour of duty specified herein, and if he wishes to remain at the Academy, he shall execute a new employment agreement.

6. The employee understands and agrees that in the event he leaves the Academy before the completion of two tours of duty, whether voluntary or involuntary, his right to reemployment will be at the grade attained immediately prior to his recruitment for an Academy assignment. If recruited from outside the FAA, his right to reemployment will be at the grade assigned at the time of recruitment. This may result in a change to a lower grade in accordance with agency policy as published in the Reemployment Handbook.

7. All terms used in this agreement shall have the same definition as in the Reemployment Handbook.

8. This agreement is not effective until endorsed by a representative of *Southwest* (Employee's Parent Organization) the employee's parent organization if the employee was recruited from outside the FAA.

(Signature of FAA Representative) (Signature of Employee)

E. E. Carpenter *Robert W. Boutz*

ENDORSEMENT: *Message 172020 dated Mar 69 from Southwest Regian*
(Employee's Parent Organization)

FOR INFORMATION ONLY

The entire handbook entitled, "Reemployment, Restoration, and Return Rights," (3330.6) relating to reemployment rights has been incorporated in the FAA Employment Agreement for Academy Instructors. The parts of the handbook in which employees have indicated the most interest are paraphrased and reproduced below for convenient reference.

1. An Academy instructor must complete one scheduled tour of duty to be eligible for reemployment rights unless an exception is authorized by mutual agreement of the Director, Aeronautical Center and the parent organization.

2. An instructor who serves more than three scheduled tours of duty at the Academy forfeits his eligibility for reemployment rights unless an extension is approved.

3. Instructors are normally expected to serve two tours at the Academy. However the Director, Aeronautical Center may not agree to a second tour for reasons which are deemed to be in the best interests of the FAA. If this occurs, the instructor will be returned to his parent organization, normally at the grade held at the time of selection for the Academy assignment.

4. Eligible employees who serve two or more scheduled tours shall be returned at the grade held at the time of exercising such rights, or at the grade held immediately prior to the Academy assignment, whichever is higher.

---

cc: NC-902/SW-10
4-9-69

EXHIBIT NO. 2

FAA Form 3330-5.1

EMPLOYMENT SUPPLEMENTAL AGREEMENT FOR ACADEMY INSTRUCTORS

(This Agreement Is To Be Executed For Subsequent Tours Of Duty And Attached To The Employment Agreement For Academy Instructors, FAA Form 3330-5)

(Name of Employee)
BOUTZ, Robert W.

Having fulfilled the terms and conditions of the Employment Agreement and any supplemental agreements incor-

porated therein, the employee named above and the Federal Aviation Administration agree as follows:

1. This supplemental agreement is incorporated and made a part of the Employment Agreement for Academy instructors.

2. The employee agrees to serve an additional tour of duty of *24* months* and shall have reemployment rights with the FAA in accordance with the terms and conditions of the Reemployment Handbook.

3. If the employee has completed two tours of duty under this Employment Agreement, the Aeronautical Center and the parent organization must approve the extension of reemployment rights by endorsement in the space provided below.

(Parent Organization)
SW Not applicable. Second tour.

4. If the employee has completed three tours of duty under this Employment Agreement, the Associate Administrator for Personnel and Training and the parent organization must approve the extension of reemployment rights by endorsement in the spaces provided below.

* * * *

5. This agreement is not effective until endorsed by the employee and the FAA Representative.

(Signature of Employee)
Robert W. Boutz

(Signature of the FAA Representative)
Carolyn Hokman for Elwyn E. Carpenter

(Remarks) ....
**Second tour ends April 1973.*

EXHIBIT NO. 3

[NOTE: Page 5 of the Petition erroneously refers to Exhibit 3(a) for a 7 Feb. 1973 letter which is actually found in Exhibit 4]

FAA Form 1522 (2-65)

RECORD OF VISIT

(Name of Person Contacted or in Conference and Location)
Bob Brown, Chief Data Processing Section, AAC-942

(Subject)
Grievance, Robert W. Boutz

(Digest)
I confirmed that Mr. Brown was not in his present position at the time Mr. Boutz reported in to the section. I inquired if his Section was recruiting at this time, would they brief a prospective employee on the 3R program. He said they would but he felt sure such was not the case four years ago. He said that the 3R program at that time was in his opinion an avenue for an instructor to return to the field if after a period of time as an instructor he did not desire to persue it as a career. This, he felt, made recruitment of instructors from the field an easier task since a prospective candidate would not feel that acceptance of an Academy assignment would permanently sever his ties with his region. Since most of the Data Processing Instructors were Engineers he also felt the relationship to the former field position would enhance the grade level that would prevail during the instruction assignment. Mr. Brown volunteered that Mr. Boutz was a good employee and not a trouble maker. He said that he was convinced that Boutz was undertaking a sincere action which was supported by numerous other instructors. I asked if he thought this might be a group action with Mr. Boutz acting as the leader. He said he did not think it was a group action although other

instructors had a vital interest in the outcome of the grievance filed by Mr. Boutz. I asked Mr. Brown if he knew of any student critques at the close of a course that indicated the student thought the instructor was out of touch with conditions in the field. Mr. Brown thought there might have been a few in some other areas but that most students coming to his section were entering a new course of training and would not consider the instructor as out of touch. Mr. Brown concluded our general discussion by saying that instructors felt the 3R program was a right and a benefit and not an avenue to remove an instructor from his Academy position.

(s) *M. L. Sheppard*
15 March 1973 *Grievance Examiner*

EXHIBIT NO. 4

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AERONAUTICAL CENTER
P. O. Box 25082
Oklahoma City, Oklahoma 73125

(Date):
7 FEB 1973

(Subject):
Reemployment, Restoration and Return Rights

(To):
Robert W. Boutz, AAC-942A
Through: AAC-940
AAC-942
AAC-942A

I am unable to accept the declaration of forfeiture of return rights as set forth in your AC Form 3330-40 which was received on 6 February 1973. Under the return rights

handbook, 3330.6, which was in effect when you came to the Academy as an instructor and which you cite, forfeiture after two tours requires concurrence of the Aeronautical Center. See Chapter 3, paragraph 42b(2). Under the current handbook, 3330.6A, which is now controlling, forfeiture at any time in an instructor's tenure is subject to the approval of the Aeronautical Center Director or his designee. See Chapter 3, paragraph 31b(6).

As you know, the agency has determined that it is desirable to rotate technical instructors through the Academy rather than have a permanent instructor staff. This practice is to provide the Academy with a work force which has direct experience in current field practices and at the same time provide a way for the employee to return to his technical career ladder with additional capacity for further growth. Evolving from this is the current practice of limiting Academy instructor assignments to two tours except in unusual circumstances.

By copy of this letter, I will ask the Aeronautical Center Manpower Division to obtain an offer of a position from your parent organization.

If you would like to discuss this with me, please call and arrange a meeting.

(s) *Leon C. Daugherty*
Superintendent, FAA Academy, AAC-900

cc: AAC-14

[APPENDIX]

EXHIBIT NO. 5

[NOTE: Page 6 of the Petition erroneously refers to Exhibit 5 for a 16 April 1973 letter which is actually found in Exhibit 9]

CONVERSATION WITH MR. DAUGHERTY, SUPT. OF FAA ACADEMY, 14th of February, 1973 (attended by Mr. Daugherty, Mr. Boutz and Mr. Quitter):

After reading Mr. Daugherty's letter of 2/7/73, which was a reply to my letter of 1/3/73, I felt there had been very little attention given to what I had said. I indicated I wished to allow my return rights to expire. Mr. Daugherty replied that I could not forfeit them, an entirely different action. I began the conversation with the intent of convincing Mr. Daugherty that, as I had indicated in my letter, the agreement could not properly be enforced as a legal contract which would be binding on me. All of my prepared arguments went out the window when Mr. Daugherty stated he didn't know whether or not the agreement was a contract and furthermore, did not think it was pertinent. He stated that if I did not accept the position offered by the Southwest Region that I would be Administratively reassigned to that position. Mr. Quitter then said something to the effect, I see, the position is obtained under the 3-R program and if a man doesn't accept it, he is reassigned to it. Mr. Daugherty confirmed that statement and he and Mr. Quitter recalled that the authority for reassignment was in an Agency order 3330.9. I then asked why they did not reassign homesteaders and Mr. Daugherty said that he could not because he didn't have a position to which they could be reassigned. I indicated I didn't know much about reassignments and would have to look into the matter, but in any event, I would file a grievance on the 3-R program. Mr. Daugherty said he understood and that his position on the matter was firm, and he would continue with obtaining a job offer for me.

(s) *Robert W. Boutz*

MEMO TO THE FILE 14 February 1973

Through: Keith Lanter, AAC-910A (*KL* 2/16/73)

Mr. Bob Boutz, AAC-940, spent approximately one hour with me this date discussing Academy return rights policy. He stated he did not believe the return rights policy was a binding legal contract and repeatedly asked if I considered it a legal contract. My answer was that I used the term "contract," but did not know if a court of law would define it as a legal contract. I advised him that it is a firm policy of the Academy at this time to approve no two-year extensions beyond the two-tour or four-year period, nor to approve any forfeitures of return rights. I consider the return right policy of the agency to be a part of the overall authority of management to make reassignments for the good of the agency at any time. The return right policy merely provided specific procedures in regards to instructors.

(s) *Leon C. Daugherty*
Superintendent, FAA Academy, AAC-900

Mr. Walter M. Quitter, AC-940 was present and participated in the above discussion.

(Init.) *L D*

EXHIBIT NO. 6

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AERONAUTICAL CENTER
P.O. Box 25082
Oklahoma City, Oklahoma 73125

(Date):
2 MAR 1973

(Subject):
Reemployment, Restoration, and Return Rights

[APPENDIX]

(From):
Superintendent, FAA Academy, AAC-900

(To):
All FAA Academy Instructors and Supervisors

Agency policy regarding instructor rotation is a matter of serious interest to all of us. I want to tell you about the status of a proposal which, if implemented, would modify the rotation system.

Last fall I asked an Airway Facilities Branch study team to review the agency instructor rotation policy and develop recommendations for its improvement. The major recommendation of that study is to establish a means by which instructors with administrative return rights may convert to "career technical instructor" positions after completing four years at the Academy. I have presented the study to several services and offices in Washington and find that they are receptive to the study and to preparation of specific proposals by the Academy.

Under the study's major recommendation, conversion would require concurrence of the employee and management with the latter's approval being based on the need for the employee's services and his past performance as an instructor. It is envisioned that the "career technical instructor" would stay abreast of conditions in the field environment by periodic field assignments, perhaps 90 days every four years, although this length and frequency might not be appropriate for all segments of the Academy.

A second major recommendation provides for moving onboard technical instructors without return rights into the "career technical instructor" category, through similar field assignments.

To expand and adapt the Airway Facilities study team's recommendation so that it would have application in all Academy areas using technical instructors, I have established an inter-branch committee which will consolidate

recommendations from all branches into an Academy position which can be the subject of a formal recommendation to top agency management. Due to the extensive preparation, coordination, and clearances that will be required for approval of a

for approval of a policy change such as this, I anticipate that it will take at least a year and possibly longer before we will know if the proposals can be implemented. Since there is no assurance that such changes will be acceptable, there will be no changes in the current policy being followed on rotation and expressed in Orders 3330.6A and AC 3330.8B.

As significant developments occur, I will keep you informed.

(s) *Leon C. Daugherty*

EXHIBIT NO. 7

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AERONAUTICAL CENTER
P. O. Box 25082
Oklahoma City, Oklahoma 73125

(Date):
5 March 1973

(In Reply Refer to):
AAC-940

(Subject):
AF Branch procedures for handling 3R program extension requests

(To):
All Personnel, AAC-940

Increasing interest in the 3R program is generating questions regarding its present and future administration in the

Academy. This is understandable and each of you in the program should be familiar with its provisions and use this knowledge in planning your future. For this purpose, I suggest that you read the applicable sections of Handbook 3330.6A and AAC Order 3330.8B. These documents provide the objectives and policies which will be followed in all decisions and actions relating to the 3R program.

Some of you may feel that your situation warrants special consideration, and may desire to temporarily defer or modify a rotational action. In this case you should thoroughly document your situation, complete AC Form 3330-40, and request your supervisor to arrange a meeting with me to discuss the matter. After the meeting the Branch will forward its recommendation to the Superintendent. At this time you may request another conference with me and the Superintendent if you desire to personally present your views to the Superintendent.

In all cases, requests for any action within the program should be recorded on AC Form 3330-40 and submitted through channels to AAC-940. The request, with the Branch recommendations, will be forwarded to AAC-900. The Superintendent will make the final decision.

An Academy team action group is now engaged in drafting a change to the 3R program, but existing policies will remain in effect until the changes have final approval, which will probably take some time.

I fully appreciate the fact that you must have knowledge of the 3R program in planning your personal and professional future, and will keep you advised of any developments or changes in the program.

(s) *W. M. Quitter*
Chief, Airway Facilities Branch, AAC-940

EXHIBIT NO. 8

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AERONAUTICAL CENTER
P.O. Box 25082
Oklahoma City, Oklahoma 73125

(Date):
April 9, 1973

(Subject):
Job Offer under 3R Program

(To):
AAC-900

The job offer, Engineering Technician, GS-802-12, that has been made to me under the 3R Program would be a giant step backwards in my career. I was working at a higher level of technical responsibility seven years ago. At that time, I had full engineering responsibility with the Department of Defense. U. S. Air Force, for developing the engineering installation packages for NAVAIDS. The installation was performed by technicians who followed the criteria and step by step installation instructions contained in the package. The job I have been offered is the FAA's counterpart of the DOD technicians who performed the installation work, described in the engineering installation package, I had the responsibility for developing.

If I should accept, or am forced into this position, it would do irreparable harm to my career.

Since there will be employees who will be removed from engineering positions because they are unable to perform the required engineering work, how can I prove I was not among them?

I could never adequately explain to future prospective employers why, in the absence of a general reduction in force,

I was removed frcm an engineering position of professional status and placed in a technician's job at a level of technical responsibility below that which I held seven years ago. This might be impossible to explain to private industry. If there were other qualified applicants seeking employment in the same job as I, the seed of doubt about the reasons surrounding the transfer could easily be sufficient to eliminate me from competition.

I am enrolled with the State of Oklahoma State Board of Registration for Professional Engineers as an Engineer in Training (EIT 1493). Reduction in the level of my technical responsibility to that of an engineering technician would reduce the amount of engineering time that I could claim towards their requirements for registration as a Professional Engineer. In addition, to meet the requirements for registration, as a Professional Engineer, I must show "Progressive experience in engineering work of a character and grade which indicates to the Board that the applicant may be competent to practice engineering . . ." Note the word "Progressive".

This job offer fails to comply with the provisions of 3330.6A Chapter 1, paragraph 1a and 5a. Under the circumstances it is also contrary to FPM chapter 250 paragraph 1-2a (5), (6), (7), (8), (10), (11), paragraph 2-1a (2) and paragraph 2-2b (1) and (2).

I would be deeply ashamed and harmed to have in my employment history a transfer to a GS-802-12 position at this time in my career, due to the reduction in level of technical responsibility and status.

I am by way of this letter requesting that I not be forced into a position where I must choose between career regression and my employment with the FAA.

(s) *Robert W. Boutz*
AAC-942A

EXHIBIT NO. 9

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AERONAUTICAL CENTER
P. O. Box 25082
Oklahoma City, Oklahoma 73125

(Date):
April 16, 1973

(In Reply Refer to):
(Subject):
Job offer under 3R Program

(To):
Superintendent, FAA Academy, AAC-900

I am unwilling to accept a career setback in the absence of a reduction in force. It would not be in my best interest to do so and I can find no justification for acting contrary to my best interest.

I hope that I will not be penalized for refusing to accept the job offered, GS-802-12, under the 3R Program, but hereby do so. I sincerely believe acceptance would be harmful to my career, and I insist on being allowed to choose those jobs that I feel are to my advantage and not those that the Academy tells me are to my advantage. Historically, Government programs, policies and philosophy about what is "best" for the employee in terms of career progression have a way of changing. I suspect that the current "need to maintain an instructor force current in field practices" will give way to a more urgent need as the needs of management or managers change. In the overall picture then, it makes one wonder about the importance of such programs. I personally don't feel the present program important enough for me to accept a career setback just for the sake of the program. Particularly when the programs policy is to "provide reasonable protection against employ-

ment uncertainties and career setbacks for employees . . .". To be candid about the matter, I believe that the present management need to rotate all technical instructors at the Academy has nothing to do with "keeping an instructor force current in field practices". I think that is the best reason that could be found to justify rotating Academy instructors, but the real management need for the program has not been announced.

I hope that it will be understood that I will take every action available to me to have my employment and career left in my care and not to allow something as important to me as my livelihood to be left to an arbitrary selection of a job that is being forced upon me for no other reason than it happens to be vacant at the time I completed four years at the Academy. It is an absolute certainty that a program that completely disregards the needs of the employee cannot and should not last. The mandatory rotation of instructors would be doomed even if it were not in violation of the regulations. Being in such flagrant violation of regulations in addition to disregarding the needs of employees assures me that its demise will be quick in coming. I don't wish to be the last employee harmed by this program before it is abandoned.

(s) *Robert W. Boutz*
Electronics Engineer, (Instruction)

EXHIBIT NO. 10

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AERONAUTICAL CENTER
P.O. Box 25082
Oklahoma City, Oklahoma 73125

(Date):
May 18, 1973

(In Reply Refer to):
R. W. Boutz

(Subject):
Reassignment

(To):
Superintendent, FAA Academy, AAC-900

As a result of your directing my reassignment to a GS-802-12 in the Southwest Region, and your proposed termination if I refuse the reassignment, I request clarification of the following points. Please give a specific answer to each question.

1. Does the FAA Academy consider the Employment Agreement and the subsequent extension to be a contract, which is binding upon me?
2. At this time do the terms of 3330.6 apply to me?
3. At this time do the terms of 3330.6A apply to me?
4. Is the position I now hold, GS-855-12, a permanent position?
5. Are Academy instructor positions part of the Competitive Service?
6. Has there been competition among like positions at the Academy to see who best fits the needs of the reassignment?

7. Are positions at the FAA Academy filled solely on the basis of merit and fitness?
8. Are there any requirements for filling Academy positions other than merit and fitness?
9. Am I qualified for the position I am now holding?
10. At this time are there GS-855-12 positions vacant at the FAA Academy?
11. If I refuse the reassignment do the provisions of title 5 USC, Part 330, subject c—Displaced Employee Program, apply to me?
12. Does my job description or job qualifications require recent field experience?
13. Under exactly what regulation, statute, executive order, or other authority has my reassignment been directed and how many Academy Instructors have been reassigned under this authority in the past twelve months?
14. Under exactly what regulations, statute, executive order or other authority will I be terminated if I refuse the reassignment, and how many Academy Instructors have been terminated under this authority in the past twelve months

I request that I be given 10 days from the receipt of your reply to this letter to make my decision regarding the reassignment.

(s) *Robert W. Boutz*

EXHIBIT NO. 11

FAA Form 1522 (2-65)

RECORD OF CONFERENCE

(Date):
5/21/73

(Name of Person Contacted or in Conference and Location)
Mr. Leon C. Daugherty, Mr. Walter Quitter, Mr. Robert W. Boutz, Mr. Riley Brock (attorney for Mr. Boutz) and the undersigned.

(Subject)
Meeting with Mr. Robert W. Boutz ref. decision to accept/decline reassignment to SW Region.

(Digest)
The purpose of the meeting was to request Mr. Boutz's decision in regards to the attached May 4, 1973 letter and to provide an official response to Mr. Boutz's letter of May 18, 1973.

Mr. Daugherty opened the meeting by advising that he had received Mr. Boutz's letter of May 18, 1973 and stated: "This meeting is to give you an official reply. Mr. Marks will make a record of this meeting and provide you a copy." Mr. Brock asked if this was to be a verbatim transcript. He was advised by the undersigned that it was not a verbatim transcript but merely recorded the intent and purpose of the meeting. Mr. Daugherty then continued, "My official position is that the questions you raised were considered during the proceedings in your grievance. I refer you to the personnel office for any further information you require. With respect to my letter of May 4, 1973, I must have your decision today as stated in the letter."

Discussions then ensued as to the entitlement to answers to the questions posed prior to Mr. Boutz giving his decision. Mr. Brock and Mr. Boutz raised these questions.

Mr. Daugherty reiterated his position and requested a decision from Mr. Boutz. Mr. Brock stated that he and Mr. Boutz would like to discuss the matter with the personnel office and that a decision would be given to Mr. Daugherty by close of business 5/21/73. Mr. Daugherty concurred with the request by Mr. Brock.

The meeting adjourned at approximately 1:15 PM, 5/21/73.

cc: Mr. Robert W. Boutz, Mr. Riley Brock, AAC-7, AAC-940, AAC-900, AAC-911, AAC-16, AAC-14

(Date)
5/21/73

(Title)
Chief Administrative Mgmt. Staff

(Signature)
FREDERICK R. MARKS

EXHIBIT NO. 12

[Letterhead, Law Office of Riley Brock]

May 21, 1973

Mr. Leon C. Daugherty
Superintendent, FAA Academy
AAC-900
FAA Aeronautical Center
Oklahoma City, Oklahoma

Re: Reply for Mr. Robert W. Boutz to your letter of May 4, 1973

Dear Mr. Daugherty:

This letter is a reply on behalf of Mr. Robert W. Boutz to your demand that he accept or decline the reassignment to the FAA Southwestern Region.

On May 18, 1973, Mr. Boutz requested answers to certain questions concerning the authority for your demand that he accept this proposed transfer. Earlier today during personal interview in your office, you stated that these questions had been answered during Mr. Boutz's recent grievance. I do not agree with your conclusion and renew Mr. Boutz's request for answers to them.

You have set today as the deadline for Mr. Boutz to either accept or decline the directed reassignment, but, if you will thoughtfully reconsider Mr. Boutz's questions you will surely see that they bear upon matters which Mr. Boutz should have benefit of in arriving at any final decision.

This proposed reassignment is one not requested by Mr. Boutz, and to the present time Mr. Boutz has not been informed as to the specific authority by which he can be forced to accept such reassignment. Additionally, no clear cut alternative action has been proposed in the event that Mr. Boutz does not accept the proposed reassignment.

In the present posture of the situation, the FAA Academy Administration has directed a reassignment which Mr. Boutz did not request; therefore, since he has been a passive element thus far, he intends to remain a passive element until, at least, such time as he is fully informed as to the specific authority for his forced reassignment and the alternatives he faces upon its refusal. Under these circumstances, neither Mr. Boutz nor I are able to make an informed decision with regard to his acceptance or rejection of the directed reassignment.

I am attaching to this letter a copy of a summary of a conversation which transpired between Mr. Boutz and I on the one hand, and you, Mr. Walter Quitter and Mr. Frederick R. Marks on the other hand. This conversation was held in your office on May 21, 1973, commencing at approximately 1:00 p.m. and lasted about 15 minutes. As you recall, during this conversation, Mr. Boutz and I insisted that we were entitled to answers to 14 questions pro-

pounded to you in Mr. Boutz's letter dated May 18, 1973. You insisted at the time that they were answered during Mr. Boutz's recent grievance. The summary by Mr. Marks states that these questions were considered during the grievance. There is a distinct difference between questions being considered and answered. While the answers to certain of the questions are certainly obvious, the answers to questions No. 1, 2, 3, 6, 10, 11, 13 and 14, are either germane to the Agency's authority to displace him or his rights upon displacement. Your insistence that Mr. Boutz make a decision effecting his livelihood and future professional status while you maintain a shroud of secrecy around your authority to displace him, (questions 1, 2, 3, 4, 6, 10, 13 and 14) as well as around his rights upon displacement (questions 4, 6 and 11) is tantamount to asking him to play a game of blind man's bluff.

Yours very truly,
(s) *Riley Brock*

RB:nh
Enclosures: As stated above.

EXHIBIT NO. 13

[Letter from Leon C. Daugherty, FAA Academy]

MAY 25 1973

Mr. Robert W. Boutz
Airway Facilities Branch
FAA Academy
FAA Aeronautical Center
Oklahoma City, Oklahoma

Dear Mr. Boutz:

This is notice that I propose to remove you from your position of Electronic Engineer (Instructor), GS-855-12,

$19,462 per annum, at the Airway Facilities Branch, FAA Academy, FAA Aeronautical Center, Oklahoma City, Oklahoma, not earlier than 30 days from the date you receive this notice. The reason for this proposed action is your refusal to accept a position change within the FAA which would carry out the terms of the established administrative return rights policy for Academy instructors.

The facts are that about the time of your initial employment with the FAA on April 6, 1969, you signed FAA Form 3330.5, Employment Agreement for Academy Instructors. This agreement provided that an instructor's employment was subject to the provisions of directive 3330.6, Re-employment, Restoration and Return Rights. The agreement stipulated that re-employment, rights were to the FAA's Southwest Region, that the parties shall abide by and complete all employment agreements between them, that an Academy instructor must complete one scheduled tour of duty (of two years duration) to be eligible for re-employment rights, and if the employee completed the tour of duty specified and wished to remain at the Academy for an additional tour, he shall execute a new employment agreement.

Because your first two-year tour of duty was to expire during April 1971, a new agreement was entered into. The second document you signed, indicating your agreement thereto, was FAA Form 3330.5.1, Employment Supplemental Agreement for Academy Instructors. This agreement stipulated that the employee agrees to serve an additional tour of duty of 24 months and shall have re-employment rights with the FAA in accordance with the terms and conditions of the Re-employment Handbook.

Directive 3330.6 entitled "Re-employment, Restoration, and Return Rights", was in effect at the time of your employment with the FAA in April 1969. This regulation was revised and republished under the date of July 27, 1971, and designated as 3330.6A. Neither regulation 3330.6 nor

3330.6A provides you the right of independent forfeiture of return rights at the end of two 2-year tours of duty at the Aeronautical Center and we are unwilling to accept such forfeiture.

From all the foregoing facts, it is clear that after the second 2-year tour of duty, Academy instructors are to be assigned from the FAA Academy to the region which has been determined to be their parent organization. Your second tour of duty ended on April 5, 1973. In order to fulfill the terms of the employment agreement, you were to be offered a position in the FAA's Southwest Region at the grade held at the time of exercising return rights or at the grade held immediately prior to the Academy assignment, whichever is higher.

By telegram dated March 14, 1973, a responsible representative of the Southwest Region offered you a position of Engineering Technician, GS-802-12, in the Electronics Engineering Branch, Fort Worth, Texas, a position which satisfies the terms of the return rights agreement. This offer was communicated to you about March 16, 1973. After receipt of the offer you had 30 days in which to decide whether to accept it. In response to such offer, you voiced your objections to the assignment in letters dated April 9 and 16, 1973, addressed to Superintendent, FAA Academy. In these two presentations, you objected to the job offered by the Southwest Region on grounds that it was not career progression and in your April 16 letter, you refused the job offer.

By letter dated May 4, 1973, and delivered to you on May 7, 1973, the Superintendent, FAA Academy, advised that alternatives to your relocation had been explored and that the only present recourse for you in order to retain your employment with the FAA was for you to fill the Southwest Region's job position. In that same letter the Superintendent set a deadline of May 21, 1973 for you to advise him in writing of your decision to comply with or refuse

the assignment to the Southwest Region. In a subsequent conversation, this time limit for replying was extended to May 22, 1973. To date, we do not have your answer but only a demand that certain questions you have be answered. You have had ample time to explore and resolve any questions you may have had which you felt would be helpful in arriving at a decision. Your lack of a positive answer by the time limit set is construed as a declination to accept the relocation.

Therefore, since: (1) no adjustment which is to your satisfaction can be made; (2) you have completed the normally expected two tours of 2-years each; (3) we are not willing to accept forfeiture of return rights; (4) the position change and relocation to the Southwest Region would carry out the terms of the return rights agreement; (5) you have refused the position offered by the Southwest Region by your letter of April 16; (6) your reasons for declining the offer and your reasons for failing to give a positive answer as set out in representative Riley Brock's letter of May 21, 1973 are not acceptable to me; and (7) you were given a clear chance to change your mind and to accept the position offer by the Southwest Region which you did not do by the date specified, I propose to separate you from the FAA, which action we consider to be in the best interests of the service.

In proposing this action, you are assured that your performance has been satisfactory and this action is no reflection on your competence in any way.

The material relied on to support this proposed action is being handed to you for your use and review. If you are otherwise in a duty status, you will be given 16 hours of duty time to review the material mentioned above and to prepare your reply. If you believe this amount of time unreasonable, consideration will be given to granting additional time if you submit a written request stating why more time is needed and the reasons it is required.

You may answer the reasons for this proposed action personally, in writing, or both to me. You may also submit affidavits in support of your answer. You will be allowed 15 calendar days from the date you receive this letter to submit your answer. Consideration will be given to extending this period if you submit a request stating your reasons for desiring more time and indicate the number of calendar days you desire. Full consideration will be given to any answer you submit. If you do not understand the above reason(s) why your removal is proposed, contact me for further information.

As soon as possible, after your answer is received, or after expiration of the 15-day limit if you do not answer, a written decision will be issued to you.

You will remain in an active duty status at your present grade and salary during this advance notice period.

ORIGINAL SIGNED BY
LEON C. DAUGHERTY

LEON C. DAUGHERTY
Superintendent, FAA Academy, AAC-900

cc: Mr. Riley Brock

Receipt acknowledged: (s) *Robert W. Boutz*
Date: *5/25/73.*

EXHIBIT NO. 14

[Letter from Superintendent, FAA Academy]

MAY 25 1973

Reassignment

Superintendent, FAA Academy, AAC-900

Mr. Robert W. Boutz, AAC-942A

Attached are answers to the questions contained in your letter to me dated May 18, 1973.

LEON C. DAUGHERTY

Enclosure
cc: Mr. Riley Brock

1. The FAA Academy and the Aeronautical Center consider the Employment Agreement and subsequent extensions to be recognizable obligations.

2. & 3. Directive 3330.6 was in effect at the time of your employment in the FAA Academy and as you know, this directive was revised and published as 3330.6A under the date of July 27, 1971. Neither directive grants the right of forfeiture of return rights after the completion of two 2-year tours of duty without the specific approval of the Aeronautical Center. Therefore, with respect to provisions applicable to your situation, they both apply.

4. Yes

5. Yes

6. No. Competition is not appropriate since your offered relocation is the product of the application of the 3-R Program.

7. It is not entirely clear as to what factors the terms "merit and fitness" are intended to encompass. However, positions at the Academy are filled either by following the provisions of the Merit Promotion Plan or under standard placement procedures in cases where a position is not filled by promotion. Civil Service Commission and agency regulations applying to the competitive service are utilized.

8. We believe this question is answered by item 7 above as we are not certain as to your meaning of the words "merit and fitness".

9. Yes

10. Yes

11. Yes. If you do not accept the assignment to the Southwest Region, you will be given placement assistance. But, we can give no assurance of a suitable position.

12. While your job description does not specifically require recent field experience, this is a factor important to the training of field personnel.

13. Your assignment to the Southwest Region has been directed under authority of the 3-R Program. Program features were contained in 3330.6 and are now set forth in 3330.6A. There have been many instructors relocated under this authority.

14. An applicable authority is that found in Federal Personnel Manual, Supplement 752-1. The following statement is found in Sub Chapter S1 — Action Coverage, S1-3 — Removals, a. Removals covered by Part 752, (4) Failure to Accept New Assignment:

> "When an agency has found it necessary to assign an employee to a position in a different geographical or organizational location and the employee refuses to accept the new assignment, he may be removed for failure to accept the assignment. Removal for failure to accept a new assignment is appropriate when the employee refuses a position change that would carry out the terms of an established rotation policy or refuses any other position change which the agency has determined would serve the best interests of the service. (See Burton vs. U.S. and Handler vs. Secretary of Labor)."

No instructor has been separated in the last twelve months. There have been no other relocation refusals.

EXHIBIT NO. 15

June 9, 1973

Mr. Robert W. Boutz
AAC - 942A
FAA Aeronautical Center
Oklahoma City, Oklahoma

Mr. Leon C. Daugherty
Superintendent, FAA Academy
AAC - 900
FAA Aeronautical Center
Oklahoma City, Oklahoma

Dear Mr. Daugherty,

This letter is in response to your proposal of May 25, 1973, to remove me from my position of Electronic Engineer (Instructor), GS - 855 - 12, $19,462 per annum, at the Airway Facilities Branch, FAA Academy, FAA Aeronautical Center, Oklahoma City, Oklahoma. Your stated reason for this action was given by you as my "refusal to accept a position change within the FAA which would carry out the term of the established administrative return rights policy for Academy instructors".

I wish to point out certain discrepancies of fact which exist in your May 25th. letter which proposes my dismissal.

1. My initial employment with the FAA was 1961 rather than 1969.
2. The election which I have chosen is to allow my return rights to expire in accordance with Handbook 3330.6, Chapter 3, paragraph 41C; at no time have I contended that I was *forfeiting* my return rights.
3. During the conference with you on May 21, 1973, Mr. Brock and I agreed to either accept or decline the proposed reassignment if you would state in writing that your official position was that my question submitted

to you were *answered* during the grievance procedure. Your official reply given through Mr. Frederick Marks' letter of May 21, 1973, however, was that the questions I asked were considered during the grievance procedure. No attempt was ever made by you or your office to answer these questions until I received answers concurrently with the proposal for dismissal, all dated May 25, 1973.

4. You state in your letter that the GS - 802 - 12 Engineering Technician position offered to me satisfies the terms of the return rights agreement. Chapter 1, Paragraph 6 (e) of 3330.6 states:

> "If the employee has professional status in his former position, e.g., Engineer, Architect, etc., he must be restored to a position of equal professional status."

My statuus prior to acquiring return rights was that of GS-855-11 Engineer and I must be returned to an equal professional status rather than that of Engineering Technician.

I wish also to respond to the answers which you furnished me as an attachment to your letter of proposed dismissal:

Question 1:

> Does the FAA Academy consider the Employment Agreement and the subsequent extension to be a contract, which is binding upon me?

Answer:

> The FAA Academy and the Aeronautical Center consider the Employment Agreement an dsubsequent extensions to be recognizable obligations.

Comment:

> Question 1 is pertinent to my cause and deserves an unequivocal answer. Your answer begs that question

and contributes nothing to my understanding of my circumstances. This document is either a contract or it is not a contract. If the Agency continues to use it to establish either rights or duties between employer and employee, then it should be given some definite legal characterization.

Question 2:

At this time do the terms of 3330.6 apply to me?

Question 3:

At this time do the terms of 3330.6A apply to me?

Answers:

Directive 3330.6 was in effect at the time of your employment in the FAA Academy and as you know, this directive was revised and published as 3330.6A under the date of July 27, 1971. Neither directive grants the right of forfeiture of return rights after the completion of two 2-year tours of duty without the specific approval of the Aeronautical Center. Therefore, with respect to provisions applicable to your situation, they both apply.

Comment:

You have replied that both directives apply to me. I call your attention to the date of issue of 3330.6A as being July 27, 1971. I signed the extension agreement three months prior to the existence of 3330.6A, i.e., April, 1971. I, therefore, disagree that I can be bound by terms and conditions which did not exist at the time of entering into an agreement. Your position, however, is consistent with the pressure put upon me to sign the extension agreement in 1971. At that time I was informed that the only way I could remain at the Academy was to execute a new agreement as required by Order AC - 3330.8A. At the same time I was informed that the 3R Handbook (3330.6) could be changed at any time and I would be bound by the terms of the changes.

Questions 4 & 5:

4. Is the position I now hold, GS-855-12, a permanent position?
5. Are Academy instructor positions part of the Competitive Service?

Answers:

4. Yes.
5. Yes.

Comment:

The 3-R Rotation Program is being used by the Aeronautical Center management as a subterfuge to circumvent the competitive bidding requirements of a Reduction In Force. This is being done by management either refilling or not refilling a position as it is vacated by forced rotation. It is believed, and therefore alleged, that Aeronautical Center personnel statistics will show that during the recently imposed Presidential Freeze period both the number and average grade level of Academy personnel were *very substantially* reduced. This was accomplished by a discriminatory use of the 3-R forced rotation of Instructors, rather than by Reduction In Force Rules as required by the competitive service.

Question 12:

Does my job description or job qualification require recent field experience?

Answer:

While your job description does not specifically require recent field experience, this is a factor important to the training of field personnel.

Comment:

Reference is made to ORDER AC-3330.3D, (13 July 1972) paragraph 10.C (1), at page 6 as follows:

Special Job Requirements. Special requirements which are considered highly desirable and job re-

lated may be recommended in writing by operating managers. These requirements may stem from legal, administrative or unusual conditions related to the job. They may be special licenses, an absolute training requirement, mobility, etc. *The special job requirement must be documented in the position description.* (Emphasis added)

Question 13:

Under exactly what regulation statute, executive order or other authority has my reassignment been directed?

Answer:

Your assignment to the Southwest Region has been directed under authority of the 3-R Program. Program features were contained in 3330.6 and are now set forth in 3330.6A. There have been many instructors relocated under this authority.

Comment:

Order 3330.6A was not in existence at the time I last signed an employee supplemental agreement. Your answer that authority for reassignment arises from the 3-R Program is not specific. This is also inconsistent with your statement to me in our conversation of February 14, 1973, that if I refused a reassignment under the 3-R Program that you could reassign me administratively under 3330.9, Chapter 3, paragraph 301, entitled "Administrative Reassignment and Relocation."

In addition to the above comments on specific questions I make the further general comments:

1. My directed reassignment to the Southwestern Region as an Electronic Technician is inconsistent with present Agency efforts to upgrade field Technicians to positions of Engineer.
2. I agreed to participate in a program designed for career protection—not one to promote field currency—

this change came about with ORDER 3330.8B, which is not part of the agreement.

3. Only half (approximately) of the Academy Instructors have 3-R "Rights". This makes the program inherently discriminatory.

4. Some recent Aeronautical Center employees have been given four year tours of duty with return rights to some point in the Continental U. S. to be determined at a later date. This is further inconsistency and discrimination against the rights of employees.

5. The 3-R Program is, in effect, an unauthorized, mandatory rotation policy, and therefore invalid. In a letter from Mr. A. L. Coulter to Senator Dewey F. Bartlett it was stated: "It is agency practice to rotate all technical instructors after completion of two tours, four years, at the Academy."

6. There is no way that I can protect my career without jepordizing my job, since acceptance of the directed reassignment, even under protest and appeal, would show a career regression from Engineer to Technician.

7. I have neither requested nor refused a reassignment. I did, however, ask a number of questions of you which weighed heavily upon the merits of the directed reassignment. When I did finally receive some semblance of answers to those questions they were accompanied by your proposal to terminate my employment.

8. The statement that recent field experience is a factor important to the training of field personnel emanates from abstract theory and is not supported by any known survey, study or compilation based upon comparison, sampling or other reliable criteria.

One of the stated policies of 3330.6A is:

"To provide reasonable protection against employee uncertainties and career setbacks for employees will-

ing to accept special assignments outside their normal career patterns."

This policy is consistent with that of the predecessor order 3330.6. This stated policy, however, bears no relation either directly or indirectly to a policy of insuring that Instructors have field currency. It has only an indirect bearing upon a policy of enforced career progression. Therefore, a sudden change in management policy whereby return rights, which originally were protection for the employee, become the means for management to impose its desires upon the employee, is a deceptive and misleading employment practice which is not countenanced by the rules of Federal civil employment. In fact such a practice directly violates Chapter 250 of the Federal Personnel Manual, paragraph 1-4a (1):

> "(1) Establish and define clearly the major objectives and policies governing personnel management within his agency".

The Aeronautical Center Management, both now and in the past, has been totally derilect in "clearly defining" the objectives and policies of the "Return Rights Program". The original order promulgating this program *seems* to be OAP 3330.6, dated September 15, 1964. A major revision took place on November 3, 1967, with several minor revisions over the following months. On July 27, 1971, it was rewritten and reissued as 3330.6A.

As conceived in 1967, the Return Rights Program was an employee incentive to accept employment at the Aeronautical Center, since it was in truth a benefit and right of the employee. The revisions which it has undergone however, have coverted the program into one under which a major portion of the Academy Instructors can be arbitrarily and capriciously reassigned according to the dictates of management. Recent announcements with regard to the so-called "homesteaders" indicates the intent to extend some form of the program to include an even greater portion of the Instructors.

In summary, my present situation arises from management having converted an employee right into a purported employee obligation. This purported obligation is being imposed upon me at the peril of my career and in violation of my rights to have every detail of the proceduure explained to me along with a clear and complete explanation of the exact authority under which I would be dismissed.

Yours very truuly,
(s) *Robert W. Boutz*
AAC-942A

Prepared by:
Riley Brock, Attorney at Law
3730 N.W. 23rd St.
Oklahoma City, Oklahoma 73107

EXHIBIT NO. 16

Mr. Robert W. Boutz
Airway Facilities Branch
FAA Academy
FAA Aeronautical Center
Oklahoma City, Oklahoma

JUN 28 1973

Dear Mr. Boutz:

My letter of May 25, 1973, informed you of a proposal to remove you from your position because of your refusal to accept a position change within the FAA which would carry out the terms of the established administrative return rights policy for Academy instructors.

I have carefully reviewed your written presentation of June 9, 1973, submitted in response to my letter. In this review, I have given particular attention to the elements critical to your refusal to accept relocation to the Southwest Region.

You state that you have not refused a reassignment. This, I cannot accept. In your letter to me of April 16, 1973, you stated, "I hope I will not be penalized for refusing to accept the job offered, GS-802-12, under the 3-R Program, but hereby do so". This is a forthright refusal. By letter dated May 4, 1973, I responded advising you that you were directed to accept the reassignment to the Southwest Region and that failure to comply with my relocation directive might result in your being separated from the FAA. A deadline of May 21, 1973, was set for you to provide your written decision to either comply with or refuse the assignment to the Southwest Region. Your lack of a positive response on this matter by the date set can only be construed as refusing to accept the relocation.

Also, you contend that you are entitled by regulation to an offer of a professional rather than a technician type position. The mandatory provision of the paragraph you refer to in directive 3330.6 pertains specifically to statutory return rights rather than to the administrative return rights which are granted to Academy instructors. However, you are entitled to grade consideration and the position offered by the Southwest Region satisfies the attained grade entitlement. Therefore, I find that the position offer (Engineering Technician, GS-802-12) by the FAA's Southwest Region was in compliance with paragraph 43b of 3330.6, and that my decision to return you to you parent organization is consonant with the provisions of paragraph 42b of 3330.6, the discretionary alternatives to that action not being granted.

Therefore, I find you have improperly refused to accept the proposed position change and that such change would serve the best interests of the service. This being the case and for the reasons stated in my letter of May 25, 1973, it is my decision to remove you from the service effective July 6, 1973.

You have the right to appeal this action to the FAA or to the Regional Director, Dallas Region, U. S. Civil Service

Commission, 1114 Commerce Street, Dallas, Texas 75202, or first to the FAA and then to the Civil Service Commission in accordance with the following:

a. If you appeal first to the Civil Service Commission, you will have no right to appeal to the FAA. In order for your appeal to be considered by the Commission, it must (1) be in writing, (2) give your reasons for contesting the removal with such offer of proof and pertinent documents as you are able to submit, and (3) be submitted no later than 15 calendar days after the effective date of your removal.

b. If you appeal first to the FAA, you will not be entitled to appeal to the Commission until after a decision on your appeal to the FAA is made. However, if no decision on the appeal has been made within 60 calendar days after it was filed, you may elect to terminate your appeal to the FAA by appealing to the Commission.

If you are otherwise in a duty status, you and your representative if an employee and otherwise in a duty status, will be given the duty time actually neded up to 16 hours to prepare your appeal to this action. If you believe this amount of time unreasonable, consideration will be given to granting additional time if you submit a written request stating why more time is needed and the reasons it is required.

An appeal to the FAA should be submitted through me to Mr. A. L. Coulter, AAC-1, Appeals Official. An appeal must (1) be in writing, (2) set forth the basis for your appeal, (3) state whether you desire a hearing in connection with your appeal, and (4) be submitted no later than 15 calendar days after the effective date of your removal. Upon your request, Mr. Forrest Haley, AAC-16, will give you all further information you may desire about appeals procedures to the FAA or to the Civil Service Commission.

Original Signed by Jay H. Moody

LEON C. DAUGHERTY
Superintendent, FAA Academy

Receipt acknowleged: (s) *Robert W. Boutz*
Date: 6-23-73

EXHIBIT NO. 17

STANDARD FORM 50 — Rev. December 1961
U.S. Civil Service Commission

NOTIFICATION OF PERSONNEL ACTION

(For Agency Use) bh

1. Name (Mr.)	2. (For Agency Use)	3. Birth Date
BOUTZ, ROBERT W.	AAC-942-73-36	12-24-33

4. Social Security No.	5. Veteran Preference	6. Tenure Group
233-50-6135	2 (5-point)	1

7. Service Comp. Date	9. FEGLI	10. Retirement
03-01-59	3 (Waived)	1 (CS)

12. Code	Nature of Action	13. Effective Date
325	Separation—Decl. Assign. (Ft. Worth, Texas)	07-06-73

15. From: Position Title and Number
Electronics Engineer (Instruction) AC-10653

16. Pay Plan and Occupation Code	17. (a) Grade	(b) Step	18. Salary
(93-Q) GS-855	12	06	pa $19,462

19. Name and Location of Employing Office
DOT, FAA Aeron'l Center — FAA Academy
Oklahoma City, Oklahoma — Airway Facilities Branch

25. Duty Station (City-county-State) — 26. Location Code
Oklahoma City—Oklahoma—Oklahoma — 40-3550-109

27. Appropriation — 28. Position Occupied
4010/8A0 8052/1111 — 1 (Comp. Serv.)

• • • •

30. Remarks:

Separations: Show Reasons Below As Required. Check if Applicable:
Nonsensitive position.
Offered job of Engineering Technician, GS-802-12, $19,462 pa, Ft. Worth, Texas.
No other work available.

33. Code Employing Department or Agency — 35. Date
TD 03 Department of Transportation — 07-09-73

34. Signature (Or other authentication) and Title

EXHIBIT 18

[NOTE: Page 11 of the Petition erroneously refers to Exhibit 18 for a Judgment by the United States Court of Appeals for the District of Columbia Circuit which is actually found in Exhibit 27]

[Excerpt From Grievance Examiner's Report to the Aeronautical Center Director]

8. FINDINGS.

a. I find that Handbook 3330.6 dated 3 November 1967 was the directive concerning 3R rights when the Grievant's employment began with the FAA. I also found that Handbook 3330.6, and revisions thereto, were cancelled concurrent with the issuance of Order 3330.6A, dated 27 July 1971. I also found that revision of an agency order by re-issuance is procedurally correct. (See Order 1320.1A, paragraph 5 (a) and FOREWORD

to Order 3330.6A, page (i), paragraph 3 (a).)

b. I find that the provisions contained in FAA directives are directive in nature and are to be complied with by organizations or persons whom they affect. (Order 1320.1A, paragraph (1), Policy.)

c. I find that there is both statutory and regulatory authority for administrative regulations such as FAA Orders issued by heads of agencies and personnel managers. (See Exhibit X.)

d. I find that the designated parent region concurred with the Aeronautical Center in granting the Grievant reemployment rights as prescribed in FAA directives at the time of his transfer to the FAA. (Exhibit L.)

e. I find that the grievant, at some time near the date of his employment with the FAA, (6 April 1969) executed an FAA Form 3350-5 (8-67), Employment Agreement for Academy Instructors.

f. I find that on 22 January 1971 the Grievant requested an additional two year term at the Academy by execution of a form letter furnished to him. (See Exhibit 2.)

g. I find that the Grievant executed an Employment Supplemental Agreement for Academy Instructors, (FAA Form 3330-5.1) subsequent to his 22 January 1971 request. The original is on file in the Grievant's Official Personnel Folder.

h. I find that the Grievant's contention that he can elect forfeiture of his reemployment rights at this time, if he so elects, is not in conformance with the applicable Order, 3330.6A.

i. I find that the provisions of former Handbook 3330.6 and current Order 3330.6A are not in violation of statute, Executive Order, or Civil Service Regulation. (See Exhibit X.)

EXHIBIT NO. 19

UNITED STATES CIVIL SERVICE COMMISSION
DALLAS REGION, DALLAS, TEXAS

APPEAL OF MR. ROBERT W. BOUTZ, UNDER SUBPART B OF PART 752 OF THE CIVIL SERVICE COMMISSION REGULATIONS

PART I. INTRODUCTION

Mr. Robert W. Boutz, 5530 Woodbrier, Oklahoma City, Oklahoma 73122, appealed to the Civil Service Commission from a personnel action accomplished by the Department of Transportation, Federal Aviation Administration, Oklahoma City, Oklahoma, removing him on July 6, 1973, from the position of Electronics Engineer (Instruction), GS-855-12, salary $19, 462 per annum.

Mr. Boutz presented satisfactory evidence of his entitlement to appeal to the Civil Service Commission. He has a competitive status and has completed a probationary period. The adverse action appealed, a removal accomplished by an administrative officer so acting, falls within the purview of the regulations. The appeal was filed within the Commission's established time limit.

The appellant did not file an administrative appeal with his employing agency. Upon appeal to the Commission, Mr. Boutz requested a personal hearing which was held at Oklahoma City, Oklahoma, on November 6, 1973.

PART II. ANALYSIS AND FINDINGS

By letter dated May 25, 1973, and received by the appellant the same date, Mr. Boutz was advised of a proposed personnel action which would remove him from the government service. This document, signed by Leon C. Daugherty, Superintendent, FAA Academy, Oklahoma City, Oklahoma, informed the appellant of the reasons for the proposed removal, allowing him a reasonable length of time,

fifteen calendar days, in which to file an administrative reply. He was furnished, with the proposal letter, material relied upon to support the proposed action and was allowed official time, 16 hours, to review the material. Provision was also made to grant additional review time, upon request.

The appellant replied in writing by letter dated June 9, 1973. After considering the reply, the agency advised Mr. Boutz by letter dated June 28, 1973, that the reasons set forth in the proposal of May 25, 1973, were sustained and decision had been made to remove him. The decision, signed by Ray H. Moody, for Leon C. Daugherty, was personally delivered to the appellant on June 28, 1973. The personnel action removing Mr. Boutz from his position was effective July 6, 1973. The appellant was retained in an active duty status during the advance written notice period, and was properly notified of his appeal rights in the matter.

In view of the above showing in the record, it must be concluded that the employing agency complied with the mandatory procedures required by controlling regulations. Thus, the merits of the appeal must be considered.

The reason for the proposed removal, as set forth in the agency's advance notice, reads as follows:

> "The reason for this proposed action is your refusal to accept a position change within the FAA which would carry out the terms of the established administrative return rights policy for Academy instructors.
>
> The facts are that about the time of your initial employment with the FAA on April 6, 1969, you signed FAA Form 3330.5, Employment Agreement for Academy Instructors. This agreement provided that an instructor's employment was subject to the provisions of directive 3330.6, Re-employment, Restoration and Return Rights. The agreement stipulated that re-employment rights were to the FAA's Southwest Region, that the parties shall abide by and complete all em-

ployment agreements between them, that an Academy instructor must complete one scheduled tour of duty (of two years duration) to be eligible for re-employment rights, and if the employee completed the tour of duty specified and wished to remain at the Academy for an additional tour, he shall execute a new employment agreement.

Because your first two-year tour of duty was to expire during April 1971, a new agreement was entered into. The second document you signed, indicating your agreement thereto, was FAA Form 3330.5.1, Employment Supplemental Agreement for Academy Instructors. This agreement stipulated that the employee agrees to serve an additional tour of duty of 24 months and shall have re-employment rights with the FAA in accordance with the terms and conditions of the Reemployment Handbook.

Directive 3330.6 entitled "Re-employment, Restoration, and Return Rights", was in effect at the time of your employment with the FAA in April 1969. This regulation was revised and republished under the date of July 27, 1971, and designated as 3330.6A. Neither regulation 3330.6 nor 3330.6A provides you the right of independent forfeiture of return rights at the end of two 2-year tours of duty at the Aeronautical Center and we are unwilling to accept such forfeiture.

From all the foregoing facts, it is clear that after the second 2-year tour of duty, Academy instructors are to be assigned from the FAA Academy to the region which has been determined to be their parent organization. Your second tour of duty ended on April 5, 1973. In order to fulfill the terms of the employment agreement, you were to be offered a position in the FAA's Southwest Region at the grade held at the time of exercising return rights or at the grade held immediately prior to the Academy assignment, whichever is higher.

By telegram dated March 14, 1973, a responsible representative of the Southwest Region offered you a position of Engineering Technician, GS-802-12, in the Electronics Engineering Branch, Fort Worth, Texas, a position which satisfies the terms of the return rights agreement. This offer was communicated to you about March 16, 1973. After receipt of the offer you had 30 days in which to decide whether to accept it. In response to such offer, you voiced your objections to the assignment in letters dated April 9 and 16, 1973, addressed to Superintendent, FAA Academy. In these two presentations, you objected to the job offered by the Southwest Region on grounds that it was not career progression and in your April 16 letter, you refused the job offer.

By letter dated May 4, 1973, and delivered to you on May 7, 1973, the Superintendent, FAA Academy, advised that alternatives to your relocation had been explored and that the only present recourse for you in order to retain your employment with the FAA was for you to fill the Southwest Region's job position. In that same letter the Superintendent set a deadline of May 21, 1973 for you to advise him in writing of your decision to comply with or refuse the assignment to the Southwest Region. In a subsequent conversation, this time limit for replying was extended to May 22, 1973. To date, we do not have your answer but only a demand that certain questions you have be answered. You have had ample time to explore and resolve any questions you may have had which you felt would be helpful in arriving at a decision. Your lack of a positive answer by the time limit set is construed as a declination to accept the relocation.

Therefore, since: (1) no adjustment which is to your satisfaction can be made; (2) you have completed the normally expected two tours of 2-years each; (3) we are not willing to accept forfeiture of return rights; (4) the position change and relocation to the South-

west Region would carry out the terms of the return rights agreement; (5) you have refused the position offered by the Southwest Region by your letter of April 16; (6) your reasons for declining the offer and your reasons for failing to give a positive answer as set out in representative Riley Brock's letter of May 21, 1973 are not acceptable to me; and (7) you were given a clear chance to change your mind and to accept the position offer by the Southwest Region which you did not do by the date specified, I propose to separate you from the FAA, which action we consider to be in the best interests of the service."

In support of their reason, the agency has amply documented the record, including the employment agreement, involved agency directives, and communications between the agency and appellant concerning offer of reassignment to the Southwest Region of the agency.

The appellant contends that his removal was arbitrary and capricious, not for such cause as will promote the efficiency of the service, and was accomplished without statuatory regulatory authority. Numerous contentions are made by the appellant concerning FAA Handbook 3330.6, Re-employment, Restoration and Return Rights of Department of Transportation, FAA, dated November 3, 1967, and Supplementing Orders AC 3330.8B, 3330.8A, and 3330.8, as well as Order 3330.6A dated July 27, 1971. Specifically, he contends that the departmental Re-employment, Restoration, and Return Rights (hereinafter referred to as the 3-R Program) is not authorized by statute, executive order or regulation, and generally challenges the program validity.

Further, the appellant contends that he was not fully informed by the agency concerning his rights and duties; that he was never actually reassigned but was merely offered a reassignment which he declined to accept; that the agency has not proved that he would have refused or failed to appear at his new duty station if reassignment had been effected; that in declining the reassignment offer he was

only complying with Handbook 3330.6, Chapter 3, Paragraph 42 and that in effect he has been removed for complying with that agency directive.

In those areas of personnel management in which the Civil Service Commission has been given regulatory authority, the Commission's policy is to delegate to agency heads the authority to effect personnel actions and to make personnel management decisions. Agencies are free to promulgate internal personnel instructions, directives, and regulations if these instructions do not conflict with law or Commission instructions under the jurisdiction of the Commission. Since our review of agency directives concerning the 3-R Program indicate no conflict with law or Commission regulation, it follows that no merit is seen in the appellant's contentions challenging validity of those regulations.

The evidence shows that as early as May 4, 1973, the appellant was advised in writing that his refusal to accept reassignment might result in his separation from employment. At the hearing, Mr. Boutz testified, ". . . I got the impression that the only way anybody was going to get any answers, was by refusing reassignment, getting terminated, and taking it to Court, or before the Civil Service Commission."

The appellant, having completed his second tour as an instructor at the FAA Academy, and under terms of the agency regulations, was offered, on March 14, 1973, reassignment to the position of Engineering Technician, GS-802-12, in the Electronics Engineering Branch, Southwest Region, FAA, Fort Worth, Texas. He repeatedly refused to accept the reassignment, resulting in the proposal to remove him issued May 13, 1973. Chapter 3, Paragraph 42.e.(2), Handbook 3330.6, provides:

> "If his reasons for declining are not acceptable to the Aeronautical Center or the parent organization, he *shall* return in accordance with the agency's authority to effect position changes." (Emphasis supplied)

In view of the foregoing, it must be held that the appellant did in fact refuse to accept a new assignment; that the assignment was within the administrative prerogatives of the agency; and that there is no evidence that the reassignment was made for the purpose of forcing appellant's resignation. We are of the opinion that the reason sustained by this review warrant the removal action imposed by the agency. Thus, the appellant's appeal is denied.

PART III. DECISION

Since the agency's reason for imposing the penalty of removal is supported by the evidence, it must be concluded that the removal action was warranted and effected for such cause as will promote the efficiency of the service. The removal action is therefore approved.

PART IV. NOTIFICATION OF FURTHER APPEAL RIGHT

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U. S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U. S. Civil Service Commission
Washington, D.C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

Attached is CSC Form 942 providing more detailed information about further appeals to the Civil Service Commission's Board of Appeals and Review.

For the Regional Director
CHARLES K. TINKLER
Regional Appeals Examiner

Attachment

EXHIBIT NO. 20

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
Washington, D. C. 20415

DECISION

IN THE MATTER OF)
)
) TYPE CASE: REMOVAL
)
Robert W. Boutz)

INTRODUCTION

Through counsel, appellant submitted an appeal of the January 2, 1974, decision of the Commission's Dallas Regional Office which sustained the action of the Department of Transportation in remving him from his position as Electronics Engineer (Instructor), GS-855-12, at the Federal Aviation Administration (FAA) Aeronautical Center, Oklahoma City, Oklahoma, effective July 6, 1973.

STATEMENT OF THE CASE

Appellant was employed by the Department of the Air Force at Tinker Air Force Base, Oklahoma, when he accepted a transfer to the position of Electronic Engineer (Instructor) at the FAA Aeronautical Center in Oklahoma City, Oklahoma, effective April 6, 1969. In so doing, he signed an FAA Form 3330.5 "Employment Agreement for Academy Instructors," which stated that he would remain an Academy Instructor for a 24-month period and that his reemployment rights with the FAA were to be goverened by Administrative Handbook 3330.6.

Toward the end of his tour of duty he signed another agreement extending his employment as an instructor for an additional 24 months, ending April 1973, which agreement became part of the original one.

In March 1973, the FAA offered appellant the position of Engineering Technician, GS-802-12, in Fort Worth, Texas, as his next duty assignment, consistent with the terms of his employment agreement. He requested that he not be required to accept the position, and on April 16, 1973, he specifically refused to accept the position. On May 4, 1973, he was informed that no other alternatives to the position offered were available and that his assignment to that position was directed, with the caveat that refusal to comply with the directive might result in his separation from the service.

Appellant requested certain information relative to the employment agreement, the agency's authority, and the possible separation from the agency. A time limit was set for appellant's final reply to the position offered and when no answer was received, he was notified by letter of May 25, 1973, of the proposal to remove him for "refusal to accept a position change within the FAA which would carry out the terms of the established administrative return rights policy for Academy Instructors."

A written reply to the proposal was submitted by letter of June 9, 1973, and on June 28, 1973, appellant was notified of the agency's decision to remove him based upon his improper refusal to accept a position change which would have been in the best interests of the service.

An appeal was then taken to the Dallas Regional Office of the Civil Service Commission.

FIRST LEVEL DECISION

A hearing was held pursuant to appellant's request. On January 2, 1974, the Regional Office issued its decision to sustain the agency's action. The decision was based on its findings that the mandatory procedural requirements of part 752-B of the Commission's regulations had been met; that the agency's authority to take the actions it did was clear; that the program under which appellant was to be

reassigned from his position as Academy instructor was a valid program; that his refusal to accept the reassignment was in violation of that program, by which he had earlier agreed to be bound; and that his removal for that refusal under these circumstances was warranted.

REPRESENTATIONS TO THE BOARD

On appeal to the Board, appellant contends that the agency did not have discretion under the employment agreement to effect his removal, only his involuntary reassignment; that the 3-R program (that is, Handbook 3330.6 to which the employment agreement refers) has changed so in interpretation that it is an arbitrary and capricious program because a forced rotational practice was not enforced until 1971; that the agency has not stated with particularity the reason for his removal but rather, has vacillated between a cause grounded in breach of contract for failure to carry out the terms of his employment agreement and one grounded in his refusal to accept a reassignment; that he was never reassigned by the agency and that any reassignment made as an administrative reassignment would have been unauthorized by Handbook 3330.6; that the Commission's refusal to allow several witnesses appellant requested kept him from rebutting the agency's repeated statements that the 3-R program was a stable and consistently administered program; and that both the agency and the Dallas Regional Office have repeatedly failed to answer his questions and contentions.

The agency was given the opportunity to respond to appellant's contentions and did so by letter of March 14, 1974.

ANALYSIS AND FINDINGS

A review of the record realtive to the procedures followed by the agency in bringing about appellant's removal reveals that all of the mandatory procedural requirements of part 752-B of the Civil Service regulations were followed in this case.

On the merits of the removal action, appellant has raised several contentions. The Regional Office found that appellant had refused a valid reassignment which would have been in keeping with the terms of the employment agreement which he signed and, thus, that his removal was warranted as being for such cause as would promote the efficiency of the service. A review of the entire record with emphasis on the terms of the employment agreement and Handbook 3330.6 reveals that the Region's decision is supported by substantial evidence and should be sustained.

The employment agreement which appellant signed refers to the agency's Handbook 3330.6, even though Handbook 3330.5A had been implemented by the time this appeal was taken. Since the agreement refers only to 3330.6, it is that handbook which must govern here. The agreement itself states that "Instructors are normally expected to serve two tours at the Academy." The supplemental agreement, signed in 1971, indicates that to extend a tour of duty beyond 4 years in total, the concurrence of both the Aeronautical Center and the parent organization are required. While these indicate that two tours of duty are all that will be allowed at the Academy, the language is not clearly a directive to return after two tours, as appellant points out. However, turning to Handbook 3330.6, the Board notes that paragraph 42.b provides that:

> After completing two tours of duty an eligible employee shall be returned to his parent organization, except as follows:
>
> (1) The employee, the Aeronautical Center, and the parent organization may mutually agree on a third tour and on the extension of reemployment rights for the duration of the third tour.
>
> (2) If the parent organization disapproves a third tour, the employe may, with the concurrence of the Aeronautical Center, forfeit reemployment rights and remain at the Academy.

From this it is clear that without the approval of the agency, the employee cannot unilaterally decide to remain at the Academy. Therefore, the agency had the right to refuse appellant's request to remain at the Academy and to offer him a position in the parent region as provided by paragraph 42c.

While it is true, as appellant states, that 42e does not give the agency direct authority to remove him if he refuses the offer for reasons found unacceptable to the agency, "he shall return in accordance with the agency's authority to effect position changes." When read in conjunction with section 335.102 of the Civil Service regulations, which states in part that "an agency may . . . (p)romote, demote, or reassign a career or career-conditional empl ee . . .", the agency's authority is given a broader scope. Under the regulations, the agency may remove an employee for refusing a reassignment, and this is the authority referred to by the FAA under the provisions of paragraph 42c(2) of the Handbcok 3330.6.

Appellant contends that the program of return rights is administered arbitrarily, that it has changed in interpretation, and that the Commission's refusal to allow several witnesses to testify to this in an attempt to counter the agency's assertion that the program was an established one is erroneous. The Board's review indicates that the Hearing Examiner at the Region was correct in excluding those witnesses, since the issue is not whether the program's interpretation has changed over the years, but only whether the agency had authority to do what it did in the case of this particular employee. Appellant's claim that the program has changed over the years is not denied by the agency. However, the provisions of Handbook 3330.6, quoted earlier, indicate that the agency's action was authorized. Further, appellant admitted that he had "looked into it" (Transcript, pp. 160-161) before signing the employment agreement, so that he should have been on notice that the agency was empowered to effect his reassignment and relocation.

Appellant also contends that he cannot properly be removed for failure to accept reassignment when the agency did not really reassign him. The Board finds this contention to be without merit. In the first place, the agency's letter to him of May 4, 1973, directed his reassignment. Appellant repeatedly stated that he declined to accept, not that if he were reassigned, he would reject the offer at a future time. The only agency action which would have been a more formal recognition of the reassignment would have been the cutting of an SF-50. Under the circumstances, the Board does not find that such a useless gesture was necessary. In addition, it has been recognized by the courts that no SF-50 need be cut in order to sustain a removal for failure to accept reassignment; it is sufficient that the reassignment is offered and that the employee refuses it.

Another contention raised to the Board is that the agency has vacillated on its cause of action in that it has at times stated that the removal was based on breach of contract in that he failed to carry out the terms of his employment agreement and that at other times it stated that the grounds were his refusal to accept transfer. The only mandatory requirements in relation to this are those of section 752.202 (a) and (f) which require that the advance notice of proposed removal state the reasons for the proposal and that final decision be based on those reasons. In this regard, the Board finds that the agency has not violated any of appellant's rights. The notice of proposed removal, dated May 25, 1973, stated that the reason for the proposal was that appellant refused a position change that would be in keeping with the terms of Handbook 3330.6. The notice of decision stated that this reason was found sustained. Since the reason given encompasses both a breach of the employment agreement and refusal to accept transfer, the Board finds no error in the agency's action.

Appellant states that his refusal of the offered position was consistent with Handbook 3330.6, specifically paragraph 41c, which states that:

> An employee who is eligible for reemployment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty. Otherwise, his reemployment rights expire.

Appellant contends that under this paragraph, he has the option of allowing his reemployment rights in the region to expire and continuing in service at the Academy. Standing alone, this paragraph might seem to authorize such action, but when read in the context of the other parts of the agreement, supra, it is clear that this paragraph only states the rule that the right to return to the region will be lost if the employee does not return after completion of his last tour at the academy. It does not, however, alter the agency's requirement (paragraph 42) that the Academy and the parent organization concurs before the employee is allowed to remain when two years at the academy have been completed.

Based upon these findings, the Board concurs in the Region's decision that the agency had the authority to reassign appellant, that he refused the reassignment, and that in light of Handbook 3330.6, his removal was for such cause as would promote the efficiency of the service.

DECISION

Accordingly, the decision of the Commission's Dallas Regional Office is hereby affirmed.

As provided by section 772.307(c) of the Civil Service regulations, decisions of the Board are final and there is no right of further administrative appeal.

For the Commissioners:

(s) *William P. Berzak*
Chairman

July 2, 1974

[APPENDIX]

EXHIBIT NO. 21

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C. 20415

FEB 2 1976

Mr. Riley Brock
Attorney at Law
3825 Northwest 23rd Street
Oklahoma City, Oklahoma 73107

Dear Mr. Brock:

This is in further response to your letters of December 12, 1975 and January 13, 1976, with attachments, requesting the Commissioners of the Civil Service Commission to reopen and reconsider, under the provisions of Section 772.308 (a) (2) and (3) of the Civil Service regulations, the appeal case of Mr. Robert W. Boutz which was decided by the Commission's Appeals Review Board on July 2, 1974.

Decisions of the Appeals Review Board are final decisions of the Civil Service Commission from which there is no further right of administrative appeal. Although the Commissioners may, in their discretion, under the provisions of Section 772.308 of the Civil Service regulations, reopen and reconsider a previous decision of the Appeals Review Board, they will not do so for the purpose of readjudicating a case and substituting their judgment for that of the Board on findings of fact and other issues of the case in the absence of new evidence or written argument which clearly meets the criteria set forth in Section 772.308 of the Civil Service regulations.

We have carefully considered the information submitted in support of the request to have Mr. Boutz's case reopened and have reviewed the case file. The file reflects that the issues pertinent to the adjudication of Mr. Boutz's appeals have been fully, carefully and exhaustively considered. We

find that the information submitted in support of the request for reopening is not sufficient to indicate error in the findings or decision of the Appeals Review Board or to meet any of the established criteria for reopening a previous decision of the Appeals Review Board set forth in Section 772.308 of the Civil Service regulations. We concur in the analysis and findings of the Appeals Review Board.

In making our review we noted your contention that the agency should have followed the reduction-in-force regulations in proposing Mr. Boutz's change in assignment. The record in the case however, shows that the change in assignment was proposed under the "3-R" program or "Return-Rights" rotation program for instructors at the FAA Academy in Oklahoma City. The reduction-in-force regulations are applicable only in certain cases when an employee is released from his competitive level when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to changes in duties, or the exercise of reemployment rights or retention rights as stated in Section 351.201 of the Civil Service regulations. None of these factors were present in Mr. Boutz's case. A change in assignment under an agency rotation program such as in this case is not considered to be a reduction-in-force action under the Civil Service regulations.

We have also noted your contention that the proposed change in assignment would have constituted a reduction in rank and that the Commission's regulations for processing adverse actions should have been applied. However, under the agency "3-R" rotation program for instructors, the record reflects that instructors who are rotated under the program are entitled only to a change in assignment, that results in no reduction in grade. Since the position offered Mr. Boutz was at the GS-12 grade level which was the same as the grade level of his position at the FAA Academy, it follows that the offer was a proper offer under the terms of the "3-R" program and the question as to whether the position offered was of a lesser rank is not pertinent to the adjudication of this case.

With regard to your contention that Mr. Boutz did not decline the assignment offered to him the record shows that this issue was discussed in the decision of the Dallas Field Office of the Federal Employee Appeals Authority, which decision was affirmed by the Appeals Review Board. Since the undisputed evidence in the file shows that Mr. Boutz did not accept the position change offered, we must concur in the previous analysis and finding on this issue.

With regard to the issue you raise as to whether Mr. Boutz's removal was for cause which promotes the efficiency of the service, we concur in the determination of the Appeals Review Board that the failure of Mr. Boutz to accept a change in assignment under the agency rotation program as directed by the agency does constitute a cause for removal which promotes the efficiency of the service.

In view of the above we must conclude that no valid basis has been presented upon which this case may be reopened and the request for reopening must be denied.

Having received a final decision of the Civil Service Commission on his appeal, Mr. Boutz has exhausted his administrative appeal rights within the Commission and the case is considered to be closed.

In view of the strong feelings expressed by and on behalf of Mr. Boutz in this matter, I regret that this reply could not be favorable.

For the Commissioners:

Sincerely yours,
(s) *Robert B. Bates*
Asst. to the Commissioners (Appeals)

EXHIBIT NO. 22

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C. 20415

May 27, 1976

Mr. Riley Brock
Attorney at Law
3825 Northewest 23rd Street
Oklahoma City, Oklahoma 73107

Dear Mr. Brock:

This is in reply to your letters of May 20, 1976, addressed to Chairman Robert E. Hampton and Commissioner L. J. Andolsek, requesting for a second time that the Commissioners of the Civil Service Commission reopen and reconsider the appeal case of Mr. Robert W. Boutz which was decided by the Commission's Appeals Review Board on July 2, 1974. This also refers to the long distance telephone conversation of May 24, 1976, between Mr. Boutz in Oklahoma City and Commissioner Andolsek and myself in Washington, D.C.

In your letter you contend that the deciding officials in Mr. Boutz's case have not yet answered certain of Mr. Boutz's contentions, such as those regarding his ". . . entitlement to reduction-in-force proceedings, his entitlement to Displaced Employee protection and his contention that the reassignment proposed by the Academy Superintendent involved a reduction in rank." You also contend that no authority has been cited which permits an administrative program such as the 3-R Program.

With regard to the issue raised regarding Mr. Boutz's entitlement to Displaced Employee protection, this is not a proper issue for consideration in this appeal case. The appeal in this case was from the action taken by the Federal Aviation Administration removing Mr. Boutz from his posi-

tion of Electronics Engineer (Instructor), GS-855-12, Aeronautical Center, Oklahoma City, Oklahoma, effective July 6, 1973. Thus, we may consider only those issues raised in connection with the removal action.

With regard to your contention that the deciding officials in Mr. Boutz's appeal case have not answered his contention that he was entitled to reduction-in-force proceedings in connection with the change in assignment proposed by the agency in his case, the file shows that this contention was discussed in my letter to you of February 2, 1976. Part 351 of the Civil Service regulations pertains to reduction-in-force actions in the Federal service.

As pointed out in my letter of February 2, 1976, the reduction-in-force regulations are applicable only in certain cases when an employee is released from his competitive level when the release is required because of a lack of work, shortage of funds, reorganization, reclassification due to changes in duties, or the exercise of reemployment rights or retention rights as stated in Section 351.201 of the Civil Service regulations. None of these factors were present in Mr. Boutz's case. Since a reduction-in-force situation did not exist, it follows that the reduction-in-force regulations were not applicable to the change in assignment proposed in Mr. Boutz's case.

With regard to your contention that the deciding officials have not considered Mr. Boutz's contention that the proposed change in assignment would have constituted a reduction in rank and that the Commission's regulations for processing adverse actions (Part 752-B of the Civil Service regulations) should have been applied, this contention was also discussed in my letter to you of February 2, 1976. As pointed out in my letter, under the agency's "3-R" Program, instructors at the FAA Academy are entitled only to a change in assignment that results in no reduction in grade or pay. Since Mr. Boutz was offered a position at the GS-12 level which was the same as the grade level of his po-

sition at the FAA Academy, it follows that the offer was a proper offer under the terms of the "3-R" Program and the question as to whether the position offered was of a lesser rank is not pertinent to the adjudication of this case.

With regard to your contentions that both Part 351 of the Civil Service regulations pertaining to reduction-in-force actions and Part 752-B of the Civil Service regulations pertaining to adverse actions were applicable in Mr. Boutz's case, there are no situations in which both the reduction-in-force and adverse action procedures are applicable and could be applied simultaneously to the same proposed change in assignment. The applicability of one of the two procedures precludes the use of the other procedure in any given case.

With regard to your contention that the deciding officials have summarily dismissed and not answered Mr. Boutz's contentions questioning the authority of the agency to reassign him under the "3-R" Program, the file shows that the issue was discussed by the Dallas Field Office of the Federal Employee Appeals Authority on pages 4 and 5 of its decision dated January 2, 1974. That decision was affirmed by the Appeals Review Board in its decision of July 2, 1974. The Dallas Field Office decision is quoted in pertinent part as follows:

> "In those areas of personnel management in which the Civil Service Commission has been given regulatory authority, the Commission's policy is to delegate to agency heads the authority to effect personnel actions and to make personnel management decisions. Agencies are free to promulgate internal personnel instructions, directives, and regulations if these instructions do not conflict with law or Commission instructions under the jurisdiction of the Commission. Since our review of agency directives concerning the 3-R Program indicate no conflict with law or Commission regulation, it follows that no merit is seen in the appel-

lant's contentions challenging validity of those regulations.

"The evidence shows that as early as May 4, 1973, the appellant was advised in writing that his refusal to accept reassignment might result in his separation from employment. At the hearing, Mr. Boutz testified, '. . . I got the impression that the only way anybody was going to get any answers, was by refusing reassignment, getting terminated, and taking it to Court, or before the Civil Service Commission.'

"The appellant, having completed his second tour as an instructor at the FAA Academy, and under terms of the agency regulations, was offered, on March 14, 1973, reassignment to the position of Engineering Technician, GS-802-12, in the Electronics Engineering Branch, Southwest Region, FAA, Fort Worth, Texas. He repeatedly refused to accept the reassignment, resulting in the proposal to remove him issued May 25, 1973. Chapter 3, Paragraph 42.e.(2), Handbook 3330.6, provides:

> 'If his reasons for declining are not acceptable to the Aeronautical Center or the parent organization, he shall return in accordance with the agency's authority to effect position changes.'

"In view of the foregoing, it must be held that the appellant did in fact refuse to accept a new assignment; that the assignment was within the administrative prerogatives of the agency; and that there is no evidence that the reassignment was made for the purpose of forcing appellant's resignation. We are of the opinion that the reason sustained by this review warrants the removal action imposed by the agency. Thus, the appellant's appeal is denied."

Each Federal agency is given certain missions by the Congress and certain resources with which to accomplish its

missions. In deciding how best to accomplish a given mission, each agency has the authority to decide what positions are necessary to accomplish the mission and when they will be created, filled or abolished, and when to make changes in personnel assignments. In Mr. Boutz's case and with regard to instructor positions at the FAA Academy, the record shows that the management of the agency determined that in order to have a viable Instructor force, it was in the best interest of the agency to provide for the rotation of Instructor personnel out of Instructor positions at the end of two-year periods of time. As pointed out by the Dallas Field Office, such a program does not conflict with law or Commission instructions under the jurisdiction of the Commission. In this connection, even without the existence of the "3-R" Program, the agency has the authority to effect changes in personnel assignments such as the change in assignment proposed in Mr. Boutz's case under its general authority to reassign personnel. This is true even though the change in assignment involves a reassignment to a position in another geographical location. See the case of *Wilfred Handler* v. *Secretary of Labor*, decided April 7, 1967 by the U.S. Court of Appeals for the District of Columbia Circuit.

With further regard to Mr. Boutz's contention that the change in assignment proposed in his case would have constituted a reduction-in-rank and that adverse action procedures were therefore required, there is no prohibition against changing an employee to another position at the same grade and pay even though the change results in a reduction-in-rank if the action is for such cause as will promote the efficiency of the service. Administrative reasons such as those given by the agency for establishing the "3-R" program are considered to constitute such cause for a change in assignment as will promote the efficiency of the service. With further regard to the question as to whether the agency followed the required procedures in Mr. Boutz's case, this was also discussed by both the Dallas

Field Office and the Appeals Review Board in their respective decisions. As pointed out by the Appeals Review Board, it was not necessary for the agency to actually cut a Standard Form 50, Notification of Personnel Action in order to sustain a removal action for failure to accept an agency directed reassignment. There is nothing in the regulations that requires a hearing, etc., before a proposed reassignment. Also, since Mr. Boutz was afforded full procedural rights in connection with the removal action, it is apparent that he was given the opportunity and did raise the issue as to whether the proposed change in assignment under the "3-R" Program was proper in his case.

Also, as pointed out by the Dallas Field Office, Mr. Boutz was aware that under the agreement he signed in connection with his employment as an Instructor, he could be changed to another position at the same grade in his parent organization and that it was discretionary with the agency as to whether he would be given successive tours of duty. It is also clear from the agreement that the approval of the management of the agency was necessary in each individual case in order to obtain a third two-year tour of duty at the FAA Academy. The fact that all Instructors were not returned to their parent organization at the end of their second or third tour of duty does not alter the fact that it was within the discretion of the management of the agency, taking into consideration the pertinent facts in each case, to decide which Instructors would be retained and which would not be retained. It is also clear from the record that being available for a change in assignment to another geographical area was a condition of employment with the agency.

In view of the above and as stated in my letter of February 2, 1976, we find no valid basis on which this case may be reopened and the request for reopening must therefore again be denied. Under the circumstances, the case is considered to be closed and any further appeal remedies

Mr. Boutz may have, if he wishes to pursue them, are in the United States Courts.

Again, I regret that we could not furnish you a favorable reply.

For the Commissioners:

Sincerely yours,

(s) *Robert B. Bates*
Assistant to the
Commissioners (Appeals)

EXHIBIT NO. 23

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov. 3, 1978]

ROBERT W. BOUTZ, Plaintiff,	)	
v.	)	Civil Action No. 77-1287
FEDERAL AVIATION ADMINISTRATION, Defendant.	)	

ORDER

Upon consideration of defendant's unopposed motion for summary judgment, and the entire record herein, and it appearing to the Court that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, it is by the Court this *3rd* day of November, 1978,

ORDERED that defendant's motion for summary judgment be and it hereby is granted and the instant action is hereby dismissed, for the following reasons:

(1) Plaintiff's allegations of procedural irregularity at the administrative hearing held by the Civil Service Commission lack merit.

(2) The decision of the Appeals Board of the United States Civil Service Commission is not arbitrary, capricious, or an abuse of discretion in determining that plaintiff was bound by the provsions set forth in the FAA's Handbook on Reemployment, Restoration, and Return Rights [FAA Form 3330.6], ("Handbook"); that under those provisions (Sections 42.b, 42.e(2)) plaintiff was required to return to a position in the FAA Southwest Region at the end of his two terms at the FAA Academy; that the position offered plaintiff in the FAA Southwest Region was at the same grade held by plaintiff at the FAA Academy, and at the same or a higher grade than held by plaintiff prior to accepting the Academy position as required by Sections 39.a and 43.b of the Handbook; that plaintiff rejected that position with reason to know that such action on his part would lead to the termination of his employment with the FAA; and that the removal of plaintiff from employment with the FAA, effective on July 6, 1973, was for cause as promoting the efficiency of the service. *See* 5 C.F.R. §§ 335.102, 752.104; *Handler* v. *Secretary of Labor*, 379 F.2d 88 (D.C. Cir. 1967).

(s) *Garland A. Gesell*
UNITED STATES DISTRICT JUDGE

EXHIBIT NO. 24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov. 3, 1978]

ROBERT W. BOUTZ, Plaintiff,	)	
v.	)	Civil Action No. 78-1108
FEDERAL AVIATION ADMINISTRATION, Defendant.	)	

ORDER

Upon consideration of defendant's unopposed motion to dismiss, or in the alternative, for summary judgment, and of the entire record herein, it is by the Court this *3rd* day of November, 1978,

ORDERED that defendant's motion be and the same hereby is granted and the instant action be and the same hereby is dismissed, for the following reason:

Denial of severance pay to plaintiff was justified by 5 C.F.R. § 550.705, by the Agreement for Academy Instructors (FAA Form 3330.5) into which he entered in April 1969, by the Employment Supplemental Agreement for Academy Instructors (FAA Form 3330.5.1) into which he entered in January 1971, and by the FAA's Handbook on Reemployment, Restoration, and Return Rights (FAA Form 3330.6).

(s) *Garland A. Gesell*
UNITED STATES DISTRICT JUDGE

[APPENDIX]

EXHIBIT NO. 25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov. 9, 1978]

ROBERT W. BOUTZ, Plaintiff,	)	
v.	)	Civil Action No. 77-1287
FEDERAL AVIATION ADMINISTRATION, Defendant.	)	

ORDER

On November 3, 1978, this Court entered an Order granting defendant's motion for summary judgment, stating the reasons for such action. Subsequent to the Court's ruling on November 3, the Clerk's Office accepted for late filing the plaintiff's response to defendant's motion for summary judgment. The Court has carefully considered this filing, together with the entire record herein, and reaffirms its ruling of November 3, 1978, granting the defendant's motion for summary judgment.

SO ORDERED.

(s) *Garland A. Gesell*
UNITED STATES DISTRICT JUDGE

November 9, 1978.

EXHIBIT NO. 26

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov. 9, 1978]

ROBERT W. BOUTZ, Plaintiff,	)	
v.	)	Civil Action No. 78-1108
FEDERAL AVIATION ADMINISTRATION, Defendant.	)	

ORDER

On November 3, 1978, this Court entered an Order granting defendant's motion for summary judgment, stating the reasons for such action. Subsequent to the Court's ruling, on November 7, the Clerk's Office accepted for late filing the plaintiff's response to defendant's motion for summary judgment. The Court has carefully considered this filing, together with the entire record herein, and reaffirms its ruling of November 3, 1978, granting the defendant's motion for summary judgment.

SO ORDERED.

(s) *Garland A. Gesell*
UNITED STATES DISTRICT JUDGE

November 9, 1978.

[APPENDIX]

EXHIBIT NO. 27

United States Court of Appeals

FOR THE DISTRIQT OF COLUMBIA CIRCUIT

[Filed Jan. 27, 1981]

No. 79-1178
No. 79-1179

September Term, 1980

ROBERT W. BOUTZ,
Appellant,

v.

FEDERAL AVIATION ADMINISTRATION

Civil Action
Nos. 77-1287
and 78-1108

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before ROBINSON, MacKINNON and WALD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that the judgment appealed from in this cause be and hereby is affirmed.

Per Curiam for the Court

(s) *George A. Fisher,* Clerk

EXHIBIT NO. 28

[ACADEMY HANDBOOK 3330.6]

CHAPTER 3. REEMPLOYMENT OF ACADEMY INSTRUCTORS

36. *COVERAGE.* This chapter covers administrative reemployment rights for employees who occupy instructor positions at the FAA Academy.

37. *DEFINITION.* As used in this chapter, the term instructor means an employee at the FAA Academy, at the level of section chief, its equivalent or below, who is engaged in the conduct, supervision, evaluation or control of technical training (excluding management training, general training, and instructor training), and who performs one or more of the following duties as a regular recurring part of his assignment.

a. Instructing students in resident courses, or in nonresident training programs conducted by the Academy in field locations, or in the FAA directed study program.

b. Planning and developing training programs.

c. Developing course content and related training material for use in resident training, directed study, and facility training programs.

d. Serving as technical assistant to the head of an organizational unit at the Academy which has responsibility for technical training.

e. Evaluating the conduct of resident, directed study and facility technical training programs.

38. *REFERENCE.* FAA Order 3410.7, Academy Instructor Placement and Development Plan.

39. *EMPLOYEE ELIGIBILITY.*

a. *Employees Who Complete Four Consecutive Years* as an instructor are eligible for reimployment rights at the grade held at the time of exercising such rights, or at the grade held immediately prior to accepting the Academy assignment, whichever is higher. If the employee was downgraded while at the Academy as a disciplinary measure, he is eligible at a grade no higher than that held at the time of exercising his reemployment rights.

b. *Employees Who Complete At Least Two But Less Than Four Years* are eligible for reemployment rights at the grade held immediately prior to accepting the Academy assignment. If the employee was recruited from outside the FAA, he is eligible for the grade level assigned at the time of recruitment.

c. *Employees Who Complete Less Than Two Years* are not eligible for reemployment rights.

d. *Employees Recruited From Outside the FAA.* A new appointee is eligible for reemployment rights only if his selection is endorsed by his parent organization. It is recommended that reemployment rights be granted except when the parent organization has avilable and can provide a well-qualified FAA employee as an alternative which would make outside recruitment unnecessary.

e. *Civil Service Rules and Regulations.* Unless exceptions are approved by the Civil Service Commission, an instructor must meet all civil service requirements for the position change involved in the exercise of reemployment rights.

40. *TOURS OF DUTY.* A standard tour of duty for instructors is two years.

41. *EMPLOYMENT AGREEMENT.*

a. Persons appointed to instructor positions who have reemployment rights under the provisions of this chapter are required to sign an employment agreement. (FAA Form 3330-5)

b. Employment agreements will be executed to correspond with a standard two year tour of duty.

c. An employee who is eligible for reemployment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty. Otherwise, his reemployment rights expire. (FAA Form 3330-5.1)

d. The Director of the Aeronautical Center is authorized to waive the remaining time covered by an employment agreement for reasons which are deemed to be in the best interests of the FAA.

42. *SCHEDULING EMPLOYEES FOR RETURN TO THEIR PARENT ORGANIZATIONS.*

Employees shall be restored to their parent organization in accordance with the provisions of this section. When flexibility permits, careful consideration should be given, not only to the needs of the Academy, but to the needs of the parent organization and the personal desires of the employee as well. In the event that an instructor is about to be adversely affected by reduction in force or reorganization, and wishes to return instead, the rules of paragraph 43.d., apply.

a. *After Completing One Tour.* Employees are normally expected to serve two tours. However, the Director of the Aeronautical Center may disapprove a second tour and return the employee to his parent organization if it is in the best interests of the FAA to do so.

b. *After Completing Two Tours.* After completing two tours of duty an eligible employee shall be returned to his parent organization, except as follows:

(1) The employee, the Aeronautical Center, and the parent organization may mutually agree on a third tour and on the extension of reemployment rights for the duration of the third tour.

(2) If the parent organization disapproves a third tour, the employee may, with the concurrence of the Aeronautical Center, forfeit reemployment rights and remain at the Academy.

c. *After Completing Three Tours.*

(1) When an employee has served three tours of duty he may be returned to his parent organization, or he may forfeit his reemployment rights and remain at the Academy.

(2) Return rights may be extended and preserved beyond the third tour by application to the Director of Personnel. The request should show that the parent organization concurs and should reflect any special arrangements or agreements made under subparagraph (4) below. If the Director of Personnel approves, return rights will be extended for one additional tour.

(3) There is no limit to the number of extensions which may be approved providing a new extension is negotiated upon completion of each succeeding tour.

(4) When extensions are approved, the grade level to which the employee has rights to return may vary by agreement depending on whether the extension is approved primarily in the interest of the FAA or for the personal benefit of the employee. In any event, the employee shall

have reemployment rights to a grade not less than that held upon completion of his third tour.

d. *When to Apply.* Employees must apply for restoration not less than 90 nor more than 120 days before the end of their tour of duty if they wish to exercise return rights.

e. *Accepting the Offer.* Within 30 days of the receipt by the employee of the parent organization's offer of restoration, the employee must accept or decline the offer. If he declines, the following alternatives apply:

(1) If his reasons for declination are acceptable to the Aeronautical Center and the parent organization, he may:

(a) Forfeit return rights and remain at the Academy, or

(b) Apply for an extension under the provisions of subparagraphs b., or c. above.

(2) If his reasons for declining are not acceptable to the Aeronautical Center or the parent organization, he shall return in accordance with the agency's authority to effect position changes.

43. *RESTORATION TO PARENT ORGANIZATIONS.*

a. *Academy Instructors Who do Not Serve a Second Tour.*

(1) Instructors recruited from within FAA who do not serve a second tour shall be returned to their parent organizations at the grade they had immediately prior to the time of recruitment for an Academy assignment.

(2) Instructors recruited from outside the agency who do not serve a second tour shall be returned to their parent organizations at the grade assigned at the time of recruitment.

(3) Exceptions to subparagraphs (1) and (2) above may be made by mutual agreement of the Academy and the parent organization.

(4) A change to a lower grade under subparagraphs (1) and (2) above is an adverse action requiring 30 days notice, an opportunity to reply, and a letter of decision. (See Handbook OA 3770.2 and Part 751 of the Civil Service Regulations). Such notices should be sympathetic and appreciative, including a positive statement that the action does not reflect unfavorably on the employee's performance when appropriate. The notice may be based on the completion of the employment agreement as the reason for the change to a lower grade.

b. *Instructors Who Complete a Second Tour.* Employees eligible for return rights after serving two or more tours shall be returned at the grade held at the time of exercising return rights or the grade held immediately prior to the time of recruitment, whichever is higher.

c. *Time Limit for Response.* The parent organization shall respond to an official request for restoration within 30 days after it is received.

d. *Effect of Reduction in Force.* If an employee is to be adversely affected by reduction in force or reorganization, he shall be offered the alternative of returning at his present grade to his parent organization through the exercise of reemployment rights.

e. *Placing the Employee.*

(1) The parent organization shall make every effort to place the employee in a suitable permanent position, thus eliminating the necessity for a second move.

(2) In the interest of flexibility and optimum employee utilization, the following alternatives and options are permitted:

(a) If the parent organization does not have an appropriate permanent assignment available, the employee may remain at the Academy until such a vacancy occurs, PROVIDED such an arrangement is satisfactory to the employee, the Aeronautical Center, and the parent organization. Under such an arrangement, the first available vacancy shall be offered the employee. If either party disagrees, the employee shall be returned in accordance with other provisions of this handbook.

(b) The employee may be placed at a grade lower than that to which he is entitled under the provisions of this handbook, if he voluntraily requests the preferred assignment in accordance with paragraph 400.a., PT P 3330.9 and provided he is fully informed of his rights to the higher grade.

(c) If the parent organization has no permanent position to offer the employee, it should solicit placement assistance from other employing jurisdictions. Any offer of employment in an employing jurisdiction other than that to which return rights are attached must be acceptable to the employee.

(d) As a last resort, the parent organization may borrow an extra position from the Office of Budget for use while it is absorbing the returnee into its regular authorized complement.

44. *DETERMINATION OF PARENT ORGANIZATION.*

a. *General Rule.* Except as provided in subparagraph b. below, the parent organization of an employee is as follows:

(1) The FAA employing jurisdiction from which the employee was selected for an Academy assignment, or

(2) The domestic region in which the employee's actual place of residence was located if the employee was recruited from outside the agency for initial assignment to an instructor's position.

(a) If an eligible employee was recruited from the departmental service of another agency, the FAA Washington Headquarters is the parent organization.

(b) When Washington Headquarters is the parent organization, the Manager of Headquarters Operations shall coordinate with appropriate offices or services in determining whether a new employee shall be granted return rights under the provisions of paragraph 39.d.

b. *The Effect of Agency Reorganizations.*

(1) When in accordance with a determination order, activities or positions move geographically to other employing jurisdictions where no similar activity was located before, administrative return rights transfer with the activity. Example: the transfer of the Central Altitude Reservation Facility (CARF) from Kansas City to Washington. Former employees of CARF who accepted instructor assignments while the facility was located in Kansas City have return rights to the Washington Headquarters rather than the Central Region.

(2) When activities or positions have not moved, but the geographic area in which they were located has shifted from one employing jurisdiction to another, return rights transfer to the employing jurisdiction currently responsible for the geographic area. Examples: The transfer of Montana from the Western Region to the Central Region, and the transfer of New Mexico from the Western to the Southwest Region. Under these examples, return rights are transferred to the Central Region and Southwest Region respectively.

45. *EMPLOYEES EXPECTED TO EXERCISE RETURN RIGHTS REPORT (RIS: PT 3330-6).*

Beginning Januaury 1, 1968, and each six months thereafter, the operating personnel office servicing the Academy shall compile a list of employees who are expected to return to their parent organization during the succeeding 12 months. Each list must be complete within itself even though the same names appear on one or more succeeding reports. A copy of the listing shall be submitted to each employing jurisdiction affected with an information copy to the Career System Division Office of Personnel. The following information shall be submitted for each employee listed:

a. Name.

b. Present position title, series, and grade.

c. Grade level to which employee is expected to return.

d. The employing jurisdiction to which rights are attached.

e. Employee's actual place of residence if hired from outside the agency for initial assignment to an instructor's position.

f. The approximate date the employee is expected to return.

46. - 50. *RESERVED.*

EXHIBIT NO. 29

[ACADEMY HANDBOOK 3330.6A]

CHAPTER 3. REEMPLOYMENT OF ACADEMY INSTRUCTORS

26. *COVERAGE.* This chapter covers administrative return rights for employees who occupy instructor positions at the FAA Academy.

27. *DEFINITION.* As used in this chapter, the term instructor means an employee at the FAA Academy, at the level of section chief, its equivalent or below, who is engaged in the conduct, supervision, evaluation or control of technical training (excluding management training, general training, and instructor training), and who performs one or more of the following duties as a regular recurring part of his assignment.

a. Instructing students in resident courses, or in nonresident training programs conducted by the Academy in field locations, or in the FAA directed study program.

b. Planning and developing training programs.

c. Developing course content and related training material for use in resident training, directed study, and facility training programs.

d. Serving as technical assistant to the head of an organizational unit at the Academy which has responsibility for technical training.

e. Evaluating the conduct of resident, directed study, and facility technical training programs.

28. *TOURS OF DUTY.* A standard tour of duty at the Academy is two years.

29. *EMPLOYEE ELIGIBILITY.*

a. *General Rule.*

(1) An instructor who does not complete the initial tour is not eligible for return rights.

(2) An instructor who completes one but not two consecutive tours is eligible for return at the grade held immediately prior to the Academy assignment. If recruited from outside the agency, he is eligible for return at the grade assigned at the time of appointment.

(3) An instructor who completes two or more consecutive tours is eligible for return at the grade held at the time of exercising return rights or at the grade held immediately prior to the Academy assignment, whichever is higher.

b. *Exceptions.*

(1) Exceptions to the general rule permitting return at a higher grade than that to which he is otherwise entitled may be made by mutual agreement of the Aeronautical Center and the parent organization.

(2) If an employee was downgraded as a disciplinary measure while serving at the Academy, he is eligible to return at a grade no higher than that held at the time of exercising return rights. at the end of the third tour.

(3) An employee who is within reach for release from his competitive level and is scheduled for separation or demotion because of reduction in force or reorganization, shall be offered the alternative of returning immediately to his parent organization. He may return at a grade no higher than that to which he would be entitled upon completion of his current tour. He is not

entitled to early return because of reduction in rank. Only if his grade or tenure is affected.

(4) A temporary promotion does not entitle the employee to return at the higher grade to which temporarily promoted.

(5) A new employee hired from outside the agency is eligible only if endorsed by his parent organization. Normally reemployment rights should be approved by the parent organization unless it has available and can provide a highly qualified employee as an alternative which would make outside recruitment unnecessary.

(6) Unless approved as an exception by the Civil Service Commission, an instructor must meet all regulatory requirements involved in the exercise of return rights.

30. *EMPLOYMENT AGREEMENT.*

a. Persons appointed to instructor positions with return rights are required to sign an employment agreement (FAA Form 3330-5).

b. Employment agreements are executed to correspond with a standard two-year tour of duty.

c. An employee with return rights must execute a new employment agreement upon completion of his most recent tour. Otherwise his return rights are forfeited at the option of the Aeronautical Center or he is returned to his parent organization in accordance with the agency's authority to effect reassignments. (See FAA Form 3330-5.1)

d. An employee without return rights need not execute an employment agreement.

e. The Director of the Aeronautical Center, or his designee, is authorized to waive the remaining time covered by an employment agreement for reasons

which are considered to be in the best interests of the FAA.

31. *SCHEDULING EMPLOYEES FOR RETURN.* Eligible employees shall be scheduled for return to their parent organizations in accordance with the provisions of this paragraph. When flexibility permits, careful consideration should be given, not only to the needs of the Academy, but to the needs of the parent organization and the personal desires of the employee as well.

a. *After Completing One Tour.* Employees are normally expected to serve two tours. However, the Director of the Aeronautical Center, or his designee, may disapprove a second tour and return the employee to his parent organization if it is in the best interests of the agency to do so .

b. *After Completing Two Consecutive Tours.*

(1) When an employee has served two consecutive tours of duty, he may at the option of the Aeronautical Center be returned to his parent organization. This option may be exercised on an individual case-by-case basis or by a standard rotation policy.

(2) The employee and the Aeronautical Center may mutually agree to a third consecutive tour with the extension of return rights to the end of such tour.

(3) Return rights may be extended and preserved beyond the third consecutive tour by a common agreement which includes the Aeronautical Center, the employee, and the parent organization. There is no limit to the number of extensions which may be approved providing a new extension is negotiated upon the completion of each successive tour. The record must be documented by the execution of a new employment agreement.

(4) Upon completion of three consecutive tours, the grade level to which the employee will have rights of return is negotiable. Inasmuch as the parent organization has the option of approving fourth-tour extensions, it also has the right to approve such extensions under stipulated conditions. For example, a condition might be that the employee agrees to return at a grade no higher than that held upon completion of the third tour. If so, the employee must be made fully aware of his right to accept the conditions for extension or return immediately to the parent organization at his current grade level. All such agreements must be in writing and well documented for the future understanding of all parties concerned. These agreements may not be negotiated at a grade level below that held at the end of the third year.

(5) Each successive tour is negotiated and approved with the understanding that the employee may be returned to the parent organization at the option of the Aeronautical Center upon completion of the approved tour.

(6) At the end of any tour, an employee who is not covered by a mandatory rotation policy may forfeit return rights and remain at the Academy indefinitely, but only if his request for forfeiture is approved by the Director of the Aeronautical Center or his designee.

(7) An employee covered by a mandatory rotation policy may not forfeit return rights and remain indefinitely. Any tour of duty which would extend him beyond the maximum period of time allowed by the rotation policy must be approved by the Director of the Aeronautical Center or his designee.

32. *IDENTIFYING THE PARENT ORGANIZATION.*

a. *General Rule.* Except as provided in subparagraph b. below, the parent organization is normally identified as follows:

(1) The FAA employing jurisdiction from which the employee was selected for an Academy assignment, or

(2) The domestic region in which the employee's actual place of residence was located if the employe was recruited from outside the agency for initial assignment to the Academy.

(a) If an employee was recruited from the departmental service of another agency, the FAA Washington headquarters is the parent organization.

(b) When Washington headquarters is the parent organization, the Manager of Headquarters Operations shall coordinate with appropriate offices or services in determining whether a new employee shall be granted return rights under the provisions of 29.b. (5).

b. *Exceptions.*

(1) When in accordance with a determination order, activities or positions move geographically to other employing jurisdictions where no similar activity was located before, return rights transfer with the activity.

(2) When activities or positions have not moved, but the geographic area in which they were located has shifted from one employing jurisdiction to another, return rights transfer to the employing jurisdiction responsible for the geographic area.

(3) If an instructor at the Academy transfers overseas, his parent organization is the same as it was while employed at the Academy. If, however, he had no return rights while employed at the Academy, either through forfeiture or ineligibility, his parent organization is the Aeronautical Center.

(4) If an overseas employee transfers to an instructor position his parent organization is the same as it was while employed overseas. If he had no return rights while employed overseas, either through forfeiture or ineligibility, his parent organization is determined as in paragraph 32.a. (2) above, i.e., the domestic region in which his last actual place of residence was located in the continental United States prior to accepting the overseas assignment, regardless of when that may have been. If he never lived in the continental United States, that is, if he always resided in Alaska or Hawaii for example, his return rights shall be back to his former overseas organization.

33. *PLACEMENT PROCEDURES.*

a. An employee may exercise his return rights upon completion of any tour provided he has not previously forfeited those rights. For planning purposes, he may be queried several months in advance as to his intent. However, the formal application should be submitted not less than 90 days nor more than 120 days before the end of his current tour. The formal request must be accompanied by a current SF-171.

b. The parent organization must respond to an official request for restoration within 30 days after receipt. The parent organization shall make every effort to place the employee in a suitable permanent posi-

tion, thus eliminating the need for a second move. If an appropriate permanent assignment is not available, the following alternatives apply:

(1) The employee may remain at the Academy until an appropriate vacancy occurs PROVIDED such an arrangement is satisfactory to the employee, the Aeronautical Center and the parent organization. If any party disagrees, the employee shall be returned in accordance with the normal provisions of this order. If a delay is arranged, the first appropriate vacancy shall be offered.

(2) The employee may be placed at a grade lower than that to which he is entitled under the provisions of this order, if he voluntarily requests the preferred assignment in accordance with paragraph 400.a., PT P 3330.9 and provided he is fully informed of his rights to the higher grade.

(3) The parent organization should solicit placement assistance from other employing jurisdictions. Any offer of employment in an employing jurisdiction other than that to which return rights are attached must be acceptable to the employee.

(4) As a last resort, the parent organization may borrow an extra position from the Office of Budget for use while it is absorbing the returnee into its regularly authorized staffing.

c. After receipt of the offer, the employee has 30 days in which to decide. If he declines the offer, the following alternatives must be considered:

(1) If his reasons for declining are not acceptable to the Aeronautical Center or the parent organization, he may be returned in accordance with the agency's authority to effect personnel changes.

(2) If his reasons for declining are acceptable to the Aeronautical Center and the parent organization, he may be granted a one-tour extension or, with the concurrence of the Aeronautical Center, he may forfeit return rights and remain indefinitely.

34. - 40. *RESERVED.*

Office-Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2058

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT W. BOUTZ, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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5 C.F.R. 752.104(a) (1973) 5

Miscellaneous:

FAA Handbook 3330.6 ..... 1, 2, 3, 4, 5, 6

FAA Handbook 3330.6A 1, 2, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2058

ROBERT W. BOUTZ, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that he was improperly terminated from employment with the Federal Aviation Administration for refusing to accept a reassignment. He argues essentially that the termination was improper because the FAA relied on provisions of a revised FAA Handbook (3330.6A), which was inapplicable to him, instead of an earlier version of the FAA Handbook (3330.6), which was applicable.

1. In 1969 petitioner accepted a transfer from Tinker Air Force Base, Oklahoma, to the position of Electronics Engineer (Instructor) at the FAA Aeronautical Center in Oklahoma City, Oklahoma (the Academy) (Pet. App. A-49). In doing so, he signed FAA Form 3330-5 ("Employment Agreement for Academy Instructors"), which provided that he would remain as an instructor at the Academy for a period of two years, until April 1971. Form 3330-5 also incorporated by reference FAA Handbook 3330.6, which

was to govern petitioner's reemployment rights with the FAA (Pet. App. A-1 to A-3). Toward the end of his two-year period, petitioner signed a supplemental agreement (FAA Form 3330-5.1), which extended his employment as an instructor at the Academy for two more years, until April 1973. The FAA Handbook was again incorporated by reference (Pet. App. A-3 to A-4).

In March 1973, the FAA offered petitioner a GS-802-12 Engineering Technician position in Fort Worth, Texas, effective at the end of his second two-year tour of duty at the Academy (Pet. App. A-50). Petitioner objected to this assignment in letters to the Superintendent of the Academy dated April 9 and 16, 1973 (*id.* at A-13 to A-16). In the April 16 letter petitioner expressly refused the reassignment (*id.* at A-15). On May 4, 1973, the FAA informed petitioner that "no other alternatives to the position offered were available and that his assignment to that position was directed, with the caveat that refusal to comply with the directive might result in his separation from the service" (*id.* at A-50). The FAA set a time limit within which petitioner was to accept or decline the reassignment. On May 25, 1973, after receiving no response before expiration of the time limit, the FAA sent petitioner notice of his proposed separation from the service for "refusal to accept a position change within the FAA which would carry out the terms of the established administrative rights policy for Academy instructors" (*id.* at A-23). The notice also stated that neither Handbook 3330.6 nor Handbook 3330.6A provided for "the right of independent forfeiture of return rights at the end of the two 2-year tours of duty at the [Academy]" and that the FAA was "unwilling to accept such forfeiture" (*id.* at. A-24). In a letter dated June 28, 1973, the FAA removed petitioner from FAA employment effective July 6, 1973 (*id.* at A-43, A-50).

Petitioner sought administrative review of the FAA's decision. The Regional Office of the Civil Service Commission approved the FAA's removal action (Pet. App. A-42 to A-48) and the Civil Service Commission Appeals Review Board affirmed that decision (*id.* at A-49 to A-55). The Civil Service Commission declined to reopen or reconsider the Review Board's decision (*id.* at A-56 to A-65).

Petitioner then filed this action in the United States District Court for the District of Columbia.[1] The district court entered summary judgment for the FAA both on petitioner's claim for severance pay (Pet. App. A-67, A-69) and on his claim for reinstatement (*id.* at A-65 to A-66, A-68). The court of appeals affirmed without opinion (*id.* at A-70).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Accordingly, further review is unwarranted.

a. The FAA's reassignment of petitioner was consistent with his employment agreement and with FAA Handbook 3330.6. Petitioner's initial employment agreement and his supplemental agreement specifically provided (Pet. App. A-1, A-4) that his reemployment rights with the FAA were to be governed by FAA Handbook 3330.6. FAA Handbook 3330.6, paragraph 42b (Pet. App. A-74; emphasis added) provided:

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[1]Initially petitioner filed an action for severance pay in the United States District Court for the Western District of Oklahoma and an action for reinstatement and back pay in the United States District Court for the District of Columbia. The district court in Oklahoma granted the FAA's motion for summary judgment, but the Tenth Circuit reversed on the ground that the administrative record, which reflected that petitioner had been involuntarily separated, had not been filed with the district court. After remand, the severance pay suit was transferred to the District of Columbia (Pet. 10).

> After completing two tours of duty an eligible employee *shall be returned to his parent organization, except* as follows:
>
> (1) The employee, the Aeronautical Center, and the parent organization *may mutually agree* on a third tour and on the extension of reemployment rights for the duration of the third tour.
>
> (2) If the parent organization disapproves a third tour, the *employee may, with the concurrence of the Aeronautical Center*, forfeit reemployment rights and remain at the Academy.

Pursuant to this paragraph, an employee like petitioner, who has completed a second tour of duty at the Academy, may not decline unilaterally to renounce his reemployment rights and remain at the Academy as an instructor. Rather, FAA concurrence in an employee's desire to remain at the Academy is necessary. Otherwise, at the conclusion of his second tour of duty, the employee "shall be returned to his parent organization." Accordingly, the FAA's reassignment of petitioner to a GS-802-12 Engineering Technician position in Fort Worth, Texas,[2] was consistent with petitioner's contractual rights.[3]

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[2]The position at Fort Worth, Texas, was with petitioner's parent organization and was at the same or a higher grade than that held by petitioner prior to accepting the Academy position, as required by Handbook 3330.6, paragraphs 39a, 42b and 43b (Pet. App. A-72, A-74, A-76).

[3]Petitioner contends (Pet. 19) that if Handbook 3330.6 is interpreted to permit the FAA to reassign him, paragraphs 41c and 42c(1) of the Handbook "become useless nulities [*sic*] * * *." Paragraph 41c (Pet. App. A-73) states:

> An employee who is eligible for reemployment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty. Otherwise his reemployment rights expire.

Petitioner refused to accept the reassignment (Pet. App. A-15).[4] Because of his refusal, the FAA terminated petitioner's employment. Removal of petitioner for refusing to accept a reassignment was, as the Civil Service Commission found (*id.* at A-48, A-55), for the purpose of promoting the efficiency of the service. Hence, petitioner's removal was within the FAA's authority and consistent with Civil Service regulations. See 5 C.F.R. 335.102, 752.104(a) (1973); *Handler* v. *Secretary of Labor*, 379 F. 2d 88 (D.C. Cir. 1967).

b. Petitioner argues (Pet. 13-14, 24-25) that the FAA erroneously applied Handbook 3330.6A, which had not

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It apparently is petitioner's position that under this paragraph he has the option of allowing his reemployment rights to expire and continuing at the Academy. Petitioner's argument is refuted, however, by paragraph 42b, which plainly provides that an employee who has completed two two-year tours of duty needs the concurrence of the Aeronautical Center to remain at the Academy. As the Civil Service Commission Appeals Review Board noted (Pet. App. A-55), "it is clear that [paragraph 41c] only states the rule that the right to return to the region will be lost if the employee does not return after completion of his last tour at the academy."

Paragraph 42c(1) similarly is of no avail to petitioner, since that paragraph, by its terms, applies only to those who have completed *three* tours of duty. Accordingly, it is in no way inconsistent with paragraph 42b, which defines the rights of an employee such as petitioner, who has completed only two tours of duty.

[4]Petitioner implies (Pet. 9) that he never refused the offered reassignment. In a letter dated April 16, 1973, however, petitioner stated (Pet. App. A-15):

> I hope that I will not be penalized for refusing to accept the job offered * * * but hereby do so.

Moreover, it is undisputed that petitioner did not make a decision concerning the proposed reassignment by the deadline set by the Academy (Pet. App. A-24 to A-25). In these circumstances, the Civil Service Commission's finding that petitioner rejected the offered reassignment is amply supported by the record and is not arbitrary, capricious, or an abuse of discretion.

been incorporated into his employment agreement, in concluding that he had no right to remain at the Academy following his completion of two two-year terms of duty there. He also asserts (Pet. 22-23) that he was not told that his removal was in accordance with Handbook 3330.6 as well as with Handbook 3330.6A until after his employment had been terminated, thus suggesting that the FAA's application of the provisions of Handbook 3330.6 to his case was only an afterthought. Both contentions are refuted by the record.

As early as February 7, 1973, the FAA notified petitioner that neither Handbook 3330.6 nor Handbook 3330.6A permitted him to remain at the Academy without the Academy's concurrence (Pet. App. A-6 to A-7). The notice of proposed termination issued by the Superintendent of the Academy on May 25, 1973, specifically stated (*id.* at A-23 to A-24):

> Neither regulation 3330.6 nor 3330.6A provides you the right of independent forfeiture of return rights at the end of two 2-year tours of duty at the Aeronautical Center and we are unwilling to accept such forfeiture.

In the letter finally terminating petitioner's employment the Superintendent also relied on Handbook 3330.6 as the basis for petitioner's return rights (Pet. App. A-37). Both the Civil Service Commission Appeals Review Board and the district court specifically found (Pet. App. A-52 to A-53, A-66) that the termination was properly effected pursuant to Handbook 3330.6. That the FAA also mentioned Handbook 3330.6A, which, if it had been in effect, would have yielded the same result, has no bearing on the fact that petitioner was properly terminated pursuant to Handbook 3330.6, which his employment agreement had incorporated.

c. Petitioner also asserts (Pet. 18, 20-21) that the FAA's decision not to permit him to remain at the Academy was an arbitrary change in policy, which constituted a breach of his contract and a denial of equal protection. These contentions are without merit because, as the Civil Service Commission responded in a letter to petitioner (Pet. App. A-64):

> The fact that all Instructors were not returned to their parent organization at the end of their second or third tour of duty does not alter the fact that it was within the discretion of the management of the agency, taking into consideration the pertinent facts in each case, to decide which Instructors would be retained and which would not be retained.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

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[5]Petitioner claims (Pet. 15-16, 20) that the hearing examiner at the Civil Service Commission evidentiary hearing improperly denied his request to present witnesses who would testify concerning the FAA's return rights policy (see Pet. 15 n.5). As the Civil Service Commission Appeals Review Board found (Pet. App. A-53), however, the hearing examiner properly excluded this testimony "since the issue is not whether the program's interpretation has changed over the years, but only whether the agency had authority to do what it did in the case of this particular employee."